DOCUMENT RESUME

ED 305 704 EA 020 587

AUTHOR Thomas, Stephen B., Ed.
TITLE The Yearbook of Education Law, 1988.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 88
NOTE 299p.; For individual chapters, see EA 020 588-595. For 1987 yearbook, see ED 292 187.
AVAILABLE FROM Publication Sales, National Organization on Legal Problems of Education, Southwest Plaza Building, 3601 S.W. 29th Street, Suite 223, Topeka, KS 66614 ($31.95 plus $2.00 postage; quantity discounts).
PUB TYPE Books (010) -- Legal/Legislative/Regulatory Materials (090) -- Reports - Research/Technical (143)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Athletics; Collective Bargaining; *Court Litigation; Educational Finance; Elementary Secondary Education; Federal Courts; Higher Education; *Legal Problems; *Legal Responsibility; Private Schools; Public Schools; *School Law; School Personnel; State Courts; Student School Relationship; Torts; *Yearbooks
IDENTIFIERS Supreme Court

ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1987 by state appellate courts and federal courts are summarized and analyzed in this book. The analyses, each written by one or more experts in education law, are divided into eight topical chapters: (1) employees; (2) bargaining; (3) pupils; (4) handicapped; (5) torts; (6) sports; (7) finance; and (8) higher education. The book includes a 14-page alphabetical index of cases cited in the text as well as a 5-page subject index. (MLF)

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THE YEARBOOK OF EDUCATION LAW 1988

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

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Library of Congress Catalog Card Number: 52-2403

PRINTED IN U.S.A.

ABOUT THE EDITOR

Dr. Stephen B. Thomas graduated from the University of Florida in 1974, where he received his doctorate in educational administration while emphasizing school law and school finance within his program. Since that time he has taught at the university level and currently is serving as Professor of Education Law, College of Education, Kent State University.

In addition to teaching, Dr. Thomas has been a consultant to several state departments of education, national organizations, and school districts. He has presented papers at a variety of national and regional conferences, has published extensively, has conducted a number of funded research studies, and has edited several books and journals. Among his publications are *Legal Issues in Special Education* and *Health Related Legal Issues in Education*, both published by NOLPE. Dr. Thomas is a member of the authors committee for *West's Education Law Reporter* and served as chairperson of the NOLPE publications committee during both 1985 and 1986. He is a member of the Board of Directors of NOLPE.

CONTRIBUTORS

BRUCE BEEZER
Associate Professor of Education
North Carolina State University
Raleigh, North Carolina

WILLIAM J. EVANS, JR.
Teacher
Smithtown Central School District
Smithtown, New York

ROBERT M. HENDRICKSON
Associate Professor and Professor-in-Charge
Higher Education Program
The Pennsylvania State University
University Park, Pennsylvania

HENRY S. LUFLER, JR.
Assistant Dean
School of Education
University of Wisconsin
Madison, Wisconsin

RALPH D. MAWDSLEY
Administrative Counsel
Liberty University
Lynchburg, Virginia

NELDA H. CAMBRON-McCABE
Professor of Education & Department Chairperson
Department of Educational Leadership
Miami University
Oxford, Ohio

MARGARET D. SMITH
Assistant Professor of Educational Leadership
College of Education and Psychology
University of Southern Mississippi
Hattiesburg, Mississippi

GAIL PAULUS SORENSON
Associate Professor
Department of Educational Administration and Policy Studies
State University of New York
Albany, New York

STEPHEN B. THOMAS
Professor and Coordinator of Educational Administration
College of Education
Kent State University
Kent, Ohio

BETTYE MacPHAIL-WILCOX
Program Coordinator for Elementary and Secondary Education
North Carolina State University
Raleigh, North Carolina

PERRY A. ZIRKEL
University Professor of Education and Law
College of Education
Lehigh University
Bethlehem, Pennsylvania

CONTENTS

1 EMPLOYEES

Gail Paulus Sorenson and Ralph D. Mawdsley

Introduction / 2
Discrimination in Employment / 2
- Race / 4
- Sex / 6
- Age / 8
- Handicap / 8

Substantive Constitutional Rights / 9
- Speech / 10
- Association / 12
- Privacy / 12
- Substantive Due Process / 13

Procedural Due Process / 13
- Liberty and Property Interests / 14
- Aspects of Notice / 16
- Aspects of Hearing / 16

Dismissal, Nonrenewal, Demotion, and Discipline / 17
- Insubordination / 18
- Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 19
- Immorality / 20
- Incompetence / 21
- Compliance with School Board Policies and State Statutes / 22

Reduction-in-force and Involuntary Leaves of Absence / 25
- Necessity for Reduction-in-force / 25
- Elimination of Position / 26
- Selection of Employees / 27
- Realignment/Reassignment / 28
- Call-back Rights / 30

Contract Disputes / 30
- Board Policies and Contract Stipulations / 31
- Administrative Regulations and Statutory Provisions / 32

Tenure / 34
- Tenure Status / 34
- Tenure by Default or Acquiescence / 35

Certification / 36
- Certification Standards / 36
- Decertification, Revocation, or Suspension /37

2 BARGAINING

Perry A. Zirkel and Margaret D. Smith

Introduction / 38
Constitutional Issues / 39
Recognition and Representation Issues / 40
  Unit Determination / 40
    Supervisory, Managerial, and Confidential Employees / 40
    Other Representation and Recognition Issues / 41
Rights and Obligations of Exclusive Bargaining Representatives / 42
  Union Rights / 42
  Obligations of Exclusive Representatives / 42
Scope of Bargaining / 45
  Mandatory Topics of Bargaining / 45
  Permissive Topics of Bargaining / 46
  Prohibited Topics of Bargaining / 46
Grievability and Arbitrability /47
  Presumption and Arbitrability /47
  Who Determines? / 48
  Procedural Issues /49
  Management Prerogatives as a Bar /50
Judicial Review /51
  Arbitration Awards and Employment Relations Board Rulings / 51
    Standard of Review / 51
  Propriety of Arbitral Awards and Agency Decisions / 53
  Statute-based Claims / 57
    Interpretation of Collective Bargaining Legislation / 57
  Interrelationship with Other Laws / 58
  Rights on Expiration of Contracts / 62
Concerted Activity / 63
Miscellaneous Decisions / 64
Conclusion / 65

3 PUPILS

Henry S. Lufler, Jr.

Introduction / 67
Public School Assignment, Tuition, and Transportation / 68
  Tuition and Assignment / 68
  Transportation / 70
  Home Instruction / 71
  Compulsory Attendance / 75

Bilingual and Bicultural Programs / 76
Private and Parochial Schools / 79
Substantive Rights of Students / 80
Search and Seizure / 80
First Amendment Religious Rights / 83
First Amendment Freedom of Expression / 88
Sanctions for Student Misconduct / 93
Suspensions and Expulsions / 93
Corporal Punishment / 96
Desegregation / 98
Systemwide Remedies / 98
Cross-district Remedies / 100
Desegregation Plan Oversight / 104

4 HANDICAPPED

Nelda H. Cambron-McCabe

Introduction / 108
Entitlement to Services / 109
Procedural Safeguards / 110
Rights of Parents or Guardians / 110
Change in Placement / 111
Program Modifications / 112
Placement During Due Process Proceedings / 112
Administrative Remedies / 113
Placement / 115
Least Restrictive Environment / 115
Private Facilities / 116
Related Services / 119
Discipline / 121
Remedies / 122
Damages / 122
Compensatory Services / 122
Attorneys' Fees / 123
Statute of Limitations / 128
State Law / 128
Discrimination Under the Rehabilitation Act, Section 504 / 130
Students / 130
Employees / 132
Handicapped Persons / 132
Reasonable Accommodation for Otherwise Qualified Individuals / 135
Other Issues / 137

5 TORTS

William J. Evans, Jr.

Introduction / 139
Negligence / 140
- Student Injuries / 140
  - Off School Property and After School Hours / 140
  - School Settings During School Hours / 141
  - En Route to and from School / 146
  - School Buildings and Grounds / 149
  - School-related Activities / 149

Educational Malpractice / 150
Negligence Defenses / 151
- Immunity / 151
  - Common Law (Governmental Immunity) / 151
  - Statutory Immunity / 153
- Other Defenses / 155
  - Notice of Claim / 155
  - Comparative Negligence / 157

Liability Insurance / 158
Employee Injuries/Workers' Compensation / 159
Assault and Battery / 164
Defamation / 164
Tortious Interference with a Contract / 166
Products Liability / 167
Intentional Infliction of Emotional Distress / 168
Constitutional Torts / 170
- Student Initiated Cases / 170
- Employee Initiated Cases / 174

6 SPORTS

Stephen B. Thomas

Introduction / 179
Eligibility / 179
- Discipline / 179
- Grades / 179
- Medical Examination / 180
- Outside Participation / 180
- Participation as a Professional / 181
- Transfer / 181

Equality of Programs / 182
- General / 183

Girl to Play on Boys' Team / 184
Boy to Play on Girls' Team / 184
Enforcement of Rules / 184
Membership / 184
Probation/Sanction / 185
Tort / 185
Intentional / 186
Assault and Battery / 186
Defamation / 186
Negligence / 186
Participants / 186
En Route to Game / 189
Spectators / 189
Employment / 190
Adverse Employment Decisions / 190
General / 190
Immorality / 191
Insubordination / 191
Contract Disputes / 192
Discrimination / 193
Unemployment Compensation / 194
Workers' Compensation / 194
Miscellaneous / 195
Amusement Tax / 195
Public Records / 195
Student Athletic Fees / 196

7 FINANCE

Bruce Beezer and Bettye MacPhail-Wilcox

Introduction / 198
Public Funds for Private Schools / 199
Sources and Allocations of Public School Funds / 200
State School Finance Programs / 200
Funds for Special Education / 208
Federal Funds for Education / 209
School Fees / 212
School Tax Issues / 212
Use of School Tax Base Revenues / 212
Tax Elections / 213
Tax Revenue Disbursement / 214
Bond Issuance / 214

Delinquent School Taxes / 215
School Tax Exemptions / 216
Uses of Revenue / 218
Conflict of Interest in School Funding / 220

8 HIGHER EDUCATION

Robert M. Hendrickson

Introduction / 223
Intergovernmental Relations / 224
Employees / 228
Discrimination in Employment / 228
Title VI / 228
Title VII / 230
The Equal Pay Act / 233
Title IX / 234
Age Discrimination / 234
Rehabilitation Act / 235
Hiring Discrimination / 235
Nontenured Faculty / 236
First Amendment Freedom of Speech / 236
Nonrenewal Procedures / 237
Part-time Faculty / 239
Tenured Faculty / 239
Termination for Cause / 239
Termination for Financial Exigency / 241
Collective Bargaining / 242
Administration and Staff / 243
Denial of Employee Privilege / 245
Denial of Employee Benefits / 246
Students / 248
Admissions / 248
Financial Aid / 250
First Amendment / 253
Freedom of Religion / 253
Freedom of Speech / 253
Freedom of Expression / 255
Dismissal / 255
Disciplinary Dismissal / 255
Academic Dismissal / 256
Other Constitutional Privileges / 259
Liability / 260

Educational Malpractice / 263
Medical Malpractice / 263
Negligence / 264
Indemnification / 265
Antitrust / 265
Patent and Trade Mark / 266

TABLE OF CASES / 267

INDEX / 281

1

EMPLOYEES

Gail Paulus Sorenson and Ralph D. Mawdsley*

Introduction / 2
Discrimination in Employment / 2
- Race / 4
- Sex / 6
- Age / 8
- Handicap / 8

Substantive Constitutional Rights / 9
- Speech / 10
- Association / 12
- Privacy / 12
- Substantive Due Process / 13

Procedural Due Process / 13
- Liberty and Property Interests / 14
- Aspects of Notice / 16
- Aspects of Hearing / 16

Dismissal, Nonrenewal, Demotion, and Discipline / 17
- Insubordination / 18
- Unprofessional Conduct, Unfitness, Willful Neglect of Duty / 19
- Immorality / 20
- Incompetence / 21
- Compliance with School Board Policies and State Statutes / 22

Reduction-in-force and Involuntary Leaves of Absence / 25
- Necessity for Reduction-in-force / 25
- Elimination of Position / 26
- Selection of Employees / 27
- Realignment/Reassignment / 28
- Call-back Rights / 30

Contract Disputes / 30
- Board Policies and Contract Stipulations / 31
- Administrative Regulations and Statutory Provisions / 32

Tenure / 34
- Tenure Status / 34
- Tenure by Default or Acquiescence / 35

Certification / 36
Certification Standards / 36
Decertification, Revocation, or Suspension /37

•For his excellent research assistance, the authors would like to express their sincere appreciation to Anthony Brandone, Assistant Principal, Koda Junior High School, Clifton Park, New York.

INTRODUCTION

This chapter covers the nearly 250 cases reported in 1987 involving precollegiate, public-sector employees. The review excludes only those cases analyzed in other sections of the *Yearbook*—tort and collective bargaining cases—and criminal cases. Those cases where purely procedural issues are involved also are omitted, and procedural issues in the remaining cases are deemphasized. Unlike the last few years, 1987 saw no Supreme Court cases related to school employment; however, where Supreme Court cases from prior years were necessary for an understanding of current cases, they were mentioned. As in previous years, the section on dismissal, nonrenewal, demotion, and discipline contains a large number of cases, with many revolving around the issue of board compliance with district and state policies.

DISCRIMINATION IN EMPLOYMENT

Allegations of employment discrimination can be based on a number of factors, with the most egregious types of discrimination being forcefully prohibited by federal law. Title VII of the Civil Rights Act of 1964[1] is the preeminent statute concerning employment discrimination. It prohibits both public and private institutions from discriminating based on race, color, religion, sex, and national origin. Sex discrimination is further prohibited by title IX of the Education Amendments of 1972,[2] which protects employees and others associated with those educational institutions that receive federal aid. Gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[3]

Federal law also protects "otherwise qualified handicapped individuals" from the discriminatory actions of federally aided employers under a statute known as section 504 (Rehabilitation Act of 1973).[4] Age

1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206(d)(1).
4. 20 U.S.C. § 794 *et seq.*

discrimination is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA), which protects workers age forty and over. And those discriminated against because of alienage are protected by a civil rights statute known as section 1981.[5]

Employment discrimination is also prohibited by a wide variety of state laws, some of which overlap considerably with federal provisions, and some of which go substantially beyond what federal law requires. State and federal constitutional provisions may also be useful to employees alleging discrimination, especially where federal and state statutory law is silent regarding the particular basis for the alleged discrimination. For example, the fourteenth amendment to the United States Constitution was used as the basis for a claim of discrimination where a licensed teacher, whose probationary appointment previously had been terminated, was not rehired by his former district.[6] The implicit allegation that the former employee was discriminated against relative to other potential employees did not amount to a constitutional violation: the school board's directive not to rehire those who had previously failed in their probationary appointments was said to be "rational." In another interesting case, a teacher sought on equal protection grounds to be released from a teaching contract with one school district so he could contract with another district in the same state. State statute prohibited school districts contracting with teachers under contract to another district. In denying the teacher's claim, the court found rational the district's refusal to release the plaintiff, even though it had done so for three other teachers, because "the district has a right to receive services from a teacher of the same quality as those given by the plaintiff."[7]

The above case also illustrates the most lenient standard of review in equal protection cases—the rational relationship test, a standard of review that is applicable when the alleged discrimination is not based on race, alienage, or national origin (which requires a compelling state interest), or gender (which requires a substantial relationship to an important governmental objective).

In a case that illustrates how state law can be combined with principles developed under federal law, a teacher-applicant alleged that he was discriminated against based on marital status (his wife was a teacher in the same school to which he applied).[8] While the district's nepotism policy was held discriminatory on its face, the applicant did

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5. 42 U.S.C. § 1981.

6. Lombard v. Board of Educ., 645 F. Supp. 1574 (E.D.N.Y. 1986).

7. Strayer v. Rensen-Union Community School, 668 F. Supp. 1275, 1277 (N.D. Iowa 1987).

8. Johnson v. Bozeman School Dist., 734 P.2d 20 (Mont. 1978).

not make out a prima facie case of discrimination.[9] When standards developed under title VII were applied, the applicant did not prove he was qualified for the position (he had a four rating on a one-to-five scale, and the district had never hired anyone with less than a two rating). The standards applied in the case were developed by the Supreme Court in *McDonnell Douglas Corporation v. Green*,[10] which requires complainants to show that they are members of a protected class, that they applied for and were qualified for the position, that they were rejected despite being qualified, and that the position remained open to persons of comparable qualifications.

Occasionally, cases arise where state and federal discrimination claims may be in conflict or where state claim resolution of disputes is alleged to be dispositive of federal claims. In one case, language in ADEA that it "shall supersede any state action" was held not to prohibit a state human rights commission from attempting to stir plaintiff or his attorney into responding.[11] In two other cases, neither a referee's nor an arbitrator's decisions at the state level could be the basis for collateral estoppel[12] or *res judiciata*[13] so as to prohibit plaintiff-teachers claims under section 1983 or title VII.

Finally, two education cases involved discrimination claims and federal or state law of a more derivative nature. In one case, a federal court held that under a title VII and section 1983 sex discrimination settlement agreement back pay was subject to withholding for taxes and FICA; the portion for interest was taxable but not subject to withholding, and the portion for personal injury was not taxable.[14] In a second case a wife's teacher certification and master's degree earned during marriage were assets entitling the husband to a portion of the wife's pension.[15]

Race

In a decision that tracked the 1986 Supreme Court decision in *Wygant v. Jackson Board of Education*,[16] the Seventh Circuit ruled that

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9. For a case where marital status claim based on nepotism was successful under state law, see Hulet v. Bozeman School Dist., No. 7, 740 P.2d 1132 (Mont. 1987).
10. 411 U.S. 792 (1973).
11. Mares v. Santa Fe Pub. Schools, 743 P.2d 110 (N.M. 1987).
12. Salida School Dist. R-32-J. v. Morrison, 732 P.2d 1160 (Colo. 1987).
13. Kirk v. Board of Educ. of Bremen Community High School Dist. No. 228, 811 F.2d 347 (7th Cir. 1987).
14. Melani v. Board of Higher Educ. of City of N.Y., 652 F. Supp. 43 (S.D.N.Y. 1986).
15. McGowan v. McGowan, 518 N.Y.S.2d 346 (Sup. Ct. 1987).
16. 106 S. Ct. 1842. See *The Yearbook of School Law 1987* at page 3 for a discussion of this case.

a collective bargaining agreement that protected black teachers from layoffs until their percentage in the work force reached the percentage of black students was not narrowly tailored.[17] "In light of *Wygant*, it is clear that a court may only uphold an affirmative action plan that is adopted by a public employer, and challenged under the [e]qual [p]rotection [c]lause, if the court first determines that the employer adopted the plan to achieve a 'compelling purpose.'"[18] According to the court, the plan was not narrowly tailored because it created an absolute preference for black teachers at the expense of white teachers, which forced the latter to bear too great a burden. The plan, therefore, violated the fourteenth amendment rights of the white teacher-plaintiffs.

Black teachers were unsuccessful in several employment discrimination cases reported in 1987. A black teacher who was not hired for a high school teaching position was unable to prove discrimination when the district showed the applicant selected had more teaching experience than the plaintiff, a valid nondiscriminatory reason for the selection.[19] Another valid nondiscriminatory reason can be seen in a case where a district declined to rehire two former black teachers who were not renewed following a strike (in which they had participated).[20] The district hired instead a white teacher who was clearly more qualified and another white teacher who was equally well-qualified and who had not participated in a strike against the district. A black teacher whose teaching contract was nonrenewed at the end of his second year failed to prevail in his section 1983 action when race was not found to be "a determining factor" in his nonrenewal (reasons given were parental concerns and lack of care of band equipment).[21]

While general allegations of race discrimination will not support a claim for employment discrimination, especially in light of affidavits from a majority of the defendants (several of whom were black) that their decision to fire a black teacher was based only on the evidence,[22] neither can needed evidence be shielded from a court. In a case where a black assistant principal was passed over four times by white applicants for a principalship, a court ruled that employment files must be opened if a pattern or practice of racial discrimination might be revealed.[23] The history of hiring patterns may be important in establishing race

17. Britton v. South Bend Community School Corp., 819 F.2d 766 (7th Cir. 1987).
18. *Id.* at 773.
19. Boudreaux v. Helena-West Helena School Dist., 819 F.2d 854 (8th Cir. 1987).
20. Daniels v. Board of Educ., 805 F.2d 203 (6th Cir. 1986).
21. Tyler v. Hot Springs School Dist., No. 6, 827 F.2d 1227 (8th Cir. 1987).
22. Lee v. Albemarle County School Bd., 648 F. Supp. 744 (W.D. Va. 1986).
23. Dixon v. Sanderson, 728 S.W.2d 878 (Tex. Ct. App. 1987).

discrimination. In one case a black carpenter employee of the board of education, who scored slightly lower in a civil service exam than a white employee chosen for an administrative position, but who had a college degree and teaching certificate and who had completed a management course (none of which the white employee had), was successful in proving race discrimination because of a serious history of racial imbalance in his division and because of disregard of an affirmative action mandate.[24]

Sex

A federal court of appeals held that a school district violated the Equal Pay Act when it paid female coaches less than male coaches.[25] After examining the federal provision that employees must receive equal pay for work requiring equal "skill, effort, and responsibility," the court determined that the Act was not intentionally violated and so denied backpay to the female coaches. In another case, a state court, referencing the federal Equal Pay Act, found no violation under the state Human Rights Act when a female coach who had coached junior and senior high volleyball teams was paid disproportionate to those coaching boys' sports.[26] Not only did plaintiff not prove that the different jobs required "equal skill, effort and responsibility" but the fact that men occasionally coached women's sports, and vice versa, indicated the pay differentials "were based not on the sex of the coaches but rather on the sex of the participants . . . [which] is a valid basis for a disparity in coaching salaries." However, a female coordinator not promoted to assistant principal who was able to prove under title VII and section 1983 that her jobs, salary, and salary range were set below those of men for comparable tasks and responsibilities and who was able to prove retaliation, was able to recover back pay and damages against the individual administrators and the school board.[27] Another physical education teacher-coach was held not a victim of sex discrimination when her appointment as head high school football coach was later rescinded.[28] The court said that "technically a vacancy existed," but "no actual vacancy existed" because the previous coach had been led by the principal and the deputy superintendent to believe that he would remain in the position for three years. In the court's opinion the case illustrated

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24. Richards v. New York City Bd. of Educ., 668 F. Supp. 259 (S.D.N.Y. 1987).
25. EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987).
26. McCullar v. Human Rights Comm'n, 511 N.E.2d 1375, 1383 (Ill. App. Ct. 1987).
27. Kitchen v. Chippewa Valley Schools, 825 F.2d 1004 (6th Cir. 1987).
28. Oates v. District of Columbia, 647 F. Supp. 1079 (D.D.C. 1986), *aff'd*, 824 F.2d 87 (D.C. Cir. 1987).

sloppy procedures, possibly violating a collective bargaining agreement, but did not amount to sex discrimination. In another case with an interesting fact situation a female teacher not hired for a newly opened third grade position was unsuccessful in her claim under the Pregnancy Discrimination Act because at the time the administrators decided not to reemploy plaintiff, she did not know she was pregnant.[29]

An additional case was remanded for a determination as to whether the retroactive application of a collective bargaining agreement limiting the seniority credit earned during maternity leave was discriminatory.[30] Women guidance counselors in New York City were successful in certifying a class of women to challenge alleged discriminatory practices in the process of promotion to supervisory and administrative positions.[31] In a title VII reverse discrimination case a male was unsuccessful in his claim that a female was hired because of an affirmative action plan rather than because of her better qualifications.[32] In another title VII case a nontenured female teacher was successful in rebutting the school administrator's reasons for nonrenewal because the court considered the administrator's testimony "evasive and contradictory."[33]

Two final cases suggest the difficulty of burden of proof under title VII. In one case, a female teacher was successful under title VII when she was discharged for two acts of insubordination with relation to her supervisor's conservative dress code ("Brooks Brother" look) by wearing excessive makeup.[34] In a second case, a female plaintiff failed in her sex discrimination claim with regard to one position when all members of the selection committee rated the male candidate more highly, and she failed in her retaliation claim with regard to a second position filled by another female because of the superiority of the candidate in experience and understanding of the relationship between curriculum development and staff development.[35]

Only two cases involving national origin were reported, and only one dealt with substantive matters. In the more significant case, a teacher transferred to another school because of her vocal support for

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29. Todhunter v. Cullman County Comm'n on Educ., 665 F. Supp. 890 (N.D. Ala. 1987).
30. Carlson v. North Dearborn Heights Bd. of Educ., 403 N.W.2d 598 (Mich. Ct. App. 1987).
31. Selzer v. Board of Educ., 112 F.R.D. 176 (S.D.N.Y. 1986).
32. McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659 (7th Cir. 1987).
33. Tye v. Board of Educ. of Polaris Joint Vocational School Dist., 811 F.2d 315, 320 (6th Cir. 1987).
34. Wislocki-Gain v. Mears, 831 F.2d 1374 (7th Cir. 1987).
35. Yatrin v. Madison Metro. School Dist., 653 F. Supp. 945 (W.D. Wis. 1987).

Hispanic students prevailed against the school board's motion for summary judgment. The court considered it irrelevant whether plaintiff considered herself a "white Hispanic" rather than "nonwhite Hispanic" because "[w]hat matters is whether defendants discriminated against plaintiff because of her 'ethnic characteristics,' as opposed to her country of origin [Cuba]."[36] In a less significant decision, a plaintiff who had lost a title VII action for national origin discrimination did not have to pay attorney's fees when the OCR had found that probable cause for discrimination existed.[37]

Age

The Eleventh Circuit remanded a case where bus drivers had been forced to retire at age sixty-five, in order to determine the feasibility of testing older employees individually for their ability to drive safely.[38] Applying a test developed by the Supreme Court in *Western Airlines v. Criswell*,[39] the court said that employers must demonstrate, first, the existence of job qualifications reasonably necessary to accomplish the business purpose and, second, that the employer is compelled to rely on age as a proxy determinant to assess a safety-related job qualification. Because the second prong was not demonstrated in this case, remand was necessary. In a case decided under a state law prohibiting discrimination "between the ages of forty and seventy inclusive" a school bus driver discharged on reaching his seventieth birthday prevailed because the employer had no factual basis for believing all persons within the class would be unable to perform the job safely or efficiently.[40]

Handicap

The leading case in this category decided by the United States Supreme Court is *School Board of Nassau County, Florida, v. Arline*[41] where an elementary teacher who had been hospitalized in the past for tuberculosis had a "record of impairment" within the Handicapped Act and was therefore a handicapped person. In including contagious diseases within the scope of the Act, the Court observed: "The fact that *some* persons who have contagious diseases may pose a serious health

36. Quintana v. Byrd, 669 F. Supp. 849, 850 (N.D. Ill. 1987).
37. *In re* Ruben, 825 F.2d 977 (6th Cir. 197).
38. Childers v. Morgan County Bd. of Educ., 817 F.2d 1556 (11th Cir. 1987).
39. 472 U.S. 400 (1985).
40. Montour School Dist. v. Commonwealth of Pa. Human Relations Comm'n, 530 A.2d 957 (Pa. Commw. Ct. 1987).
41. 107 S. Ct. 1123, 1130 (1987).

threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases."

Section 504 was applicable to a case where a school bus driver who had undergone bypass surgery had his license revoked.[42] He believed that corrective surgery, rehabilitation, and a stress test proved he was "otherwise qualified." The case was remanded for a determination as to whether the driver was an appreciable safety risk and whether individual assessment of risk through stress tests and/or other medical tests would present an "undue burden" or were, instead, required "accommodations."

Another employee brought suit under a state human rights law when he was denied an extension of his provisional license as an ESL teacher (allegedly because he had multiple sclerosis—which is typically an intermittently disabling or benign condition).[43] By its determination that an older definition of "disability" applied to the case, the court was able to reverse the state division of human rights and the education commissioner's determinations that the provisional license should be renewed. Because the condition was not a disability under the applicable law, there had been no authority to decide whether the candidate was able to teach despite his condition. However, in another case decided under the same state human rights law a school bus driver discharged as medically unfit because she had multiple sclerosis was ordered reinstated, paid backpay, and awarded $5,000 for mental anguish.[44] The court accepted the testimony of plaintiff's physician that the disease is not a danger to bus driving because symptoms come on gradually over a one-to-two week period.

Finally, recovery under section 504 depends on whether the complainant is "otherwise qualified" to perform the work. Thus a teacher terminated while hospitalized for mental and physical problems and who testified she would not be able to work in the foreseeable future, had no section 504 remedy because she was not able to perform the job in question with reasonable accommodation.[45]

SUBSTANTIVE CONSTITUTIONAL RIGHTS

The constitutional rights that are the subject of this section include the first amendment rights of freedom of speech, freedom of association

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42. *In re* Stober, 524 A.2d 535 (Pa. Commw. Ct. 1987).

43. New York City Bd. of Educ. v. Division of Human Rights, 515 N.Y.S.2d 543 (App. Div. 1987).

44. Bayport-Blue Point School Dist. v. State Div. of Human Rights, 517 N.Y.S.2d 209 (App. Div. 1987).

45. Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987).

(an implicit right), and free exercise of religion; the right to privacy; and the right of those with liberty and property interests not to be treated by government in an arbitrary or capricious fashion—i.e., the right to substantive due process under the fourteenth amendment (where state government is concerned) or under the fifth amendment (where the federal government is concerned). Although there are fewer cases in this section than last year, cases on free speech predominate, as is usual.

Speech

Employees sometimes attempt to claim a right to freedom of speech when it is really their conduct or its effect that is the subject of dispute. A case that illustrates this type of allegation occurred after a tenured teacher was fired for showing in her class an uncut "R" rated movie which contained violence and nudity.[46] The court held that the teacher's actions could not be held "expressive or communicative," making the first amendment inapplicable. A situation that appears even less a matter of communication involved a tenured teacher's claim that his refusal to perform hall duty was protected by his right to free speech or academic freedom under the state constitution.[47] Instead of upholding the dismissal purely on the grounds of insubordination, the court unanimously stated that the teacher's speech was not a matter of public concern under the *Connick* doctrine.[48]

Even where speech activities of the employee might appear more likely to be the subject of retaliatory action, employees will not be successful if it is clear that the adverse employment action was motivated entirely or largely by other factors. A case illustrating this principle concerned a school librarian, whose poor performance of newly assigned duties as audio-visual coordinator, and *not* the grievance she filed concerning these new duties, was the reason for her nonrenewal.[49] Although filing a grievance was held to be protected first amendment activity, in general, it was not a substantial or motivating factor in this case. Similarly, a probationary teacher and president of the state teachers' association presented insufficient facts to demonstrate that her nonrenewal, as part of a reduction-in-force, was based on her

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46. Fowler v. Board of Educ., 819 F.2d 657 (6th Cir. 1987).

47. Lockhart v. Arapahoe County School Dist. No. 6, 735 P.2d 913 (Colo. Ct. App. 1986).

48. *See* Connick v. Meyers, 461 U.S. 138 (1983), where it was held that an employee's speech, in order to receive first amendment protection, must first be determined as a matter of law to be on a subject of public concern.

49. Robinson v. Lebanon City School Dist. Bd. of Educ., 503 N.E.2d 541 (Ohio Ct. App. 1985).

association or speech activities.[50] A "naked and unsupported statement of opinion" that she was not renewed because of her husband's support of a tax reduction and her own union activities would not suffice.

Among employees who successfully asserted free speech claims was a high school principal who was not rehired because he criticized the superintendent's treatment of the principal's wife, a high school English teacher active in union affairs.[51] Under *Connick*, it was held that, as a matter of law, the principal's speech was a matter of public concern as evidenced by substantial community involvement in the issue of Mrs. Lewis' proposed transfer to the junior high school and by the transfer's motivation—her union activities. Because the speech was not only a substantial or motivating factor, but was the sole factor for the principal's nonrenewal, it violated the first amendment. Significantly, the court also held that the individual board members and school officials involved were not entitled to qualified immunity because they violated clearly established constitutional rights of which a reasonable person would have known.[52] Involvement with a union as a form of free speech led a federal appeals court to accord nonrenewed probationary teachers limited access to the personnel files of forty-five probationary teachers who had been renewed to determine whether the school district's reasons for nonrenewal were pretextual and based on the teachers' active union involvement.[53]

The importance of the *Connick* doctrine is reflected in two federal appeals court decisions from separate circuits. In one, a letter from five teachers to the State Department of Education enumerating instances of failure to follow established procedures under the Education for All Children Handicapped Act was a legitimate area of public concern giving "effect to the statutory policy and established educational procedures for the welfare of handicapped children."[54] In a second case, a teacher won her suit for retaliatory discharge where she testified for plaintiffs in a suit against the school district regarding school board hiring procedures and implementation of a reading program.[55] The court found that truthfulness in trial testimony especially when it does not criticize school officials but only describes school operations, is a matter of public concern under *Connick* and is protected speech.

In a slightly different case a principal of a middle school was vindicated when a court held that evidence existed from which a jury

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50. Montgomery v. Trinity Indep. School Dist., 809 F.2d 1058 (5th Cir. 1987).
51. Lewis v. Harrison School Dist. No. 1, 805 F.2d 310 (8th Cir. 1986).
52. This standard comes from Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
53. Missouri Nat'l Educ. Ass'n v. New Madrid County R-1 Enlarged School Dist., 810 F.2d 164 (8th Cir. 1987).
54. Southside Pub. Schools v. Hill, 827 F.2d 270 (8th Cir. 1987).
55. Reeves v. Clairborne County Bd. of Educ., 828 F.2d 1098 (5th Cir. 1987).

could conclude that he was dismissed in retaliation for his criticism of the district's finances and the lack of trust between teachers and the board. However, the compensatory damage award was vacated because it improperly had been based, in part, on the abstract value of a constitutional right. This had been ruled inappropriate in the Supreme Court's 1986 decision in *Memphis Community School District v. Stachura*.[56]

In a federal case with free speech implications, a tenured English teacher who had been dismissed as advisor to the school newspaper was held to have third party standing under *Singleton v. Wulff*[57] to represent the students. The court's rationale was that the students' enjoyment of their first amendment rights was inextricably bound up with plaintiff's role as faculty advisor.[58]

Association

Although freedom of association is not mentioned in the first amendment, it has long been held an essential, implicit freedom. Among the cases where freedom of association was vindicated was a case where summary judgment was precluded because of the possibility that a principal's associational activity—being present with others at public meetings where school closings were considered—was a substantial or motivating factor in the decision, following her layoff, not to offer her a comparable position in the district.[59] On the other hand, a teacher who was president of the state teacher's association presented no facts to support her allegation that an adverse employment action was in derogation of her associational rights.[60]

In two cases arising out of similar sets of facts, employees, who were dismissed after a new secretary of public instruction from the opposing political power was appointed, were able to recover substantial damages.[61] In addition to protecting employees' rights of association with a political party, the courts labored to find constitutionally protected property interests to continued employment to bolster plaintiffs' claims.

Privacy

Two quite different cases involving privacy were reported this past

56. 106 S. Ct. 2537 (1986).
57. 428 U.S. 106 (1976).
58. Romano v. Harrington, 664 F. Supp. 675, 681 (E.D.N.Y. 1987).
59. Hatcher v. Board of Pub. Educ., 809 F.2d 1546 (11th Cir. 1987).
60. Montgomery v. Trinity Indep. School Dist., 809 F.2d 1058 (5th Cir. 1987).
61. Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987); Marin Piazza v. Aponte-Roque, 668 F. Supp. 63 (D.P.R. 1987).

year. In one case, a school directive that all probationary teachers submit to urinalysis was held to violate both state and federal constitutional guarantees against unreasonable searches and seizures which are "designed to protect the personal privacy and dignity of the individuals against unwarranted intrusions by the state."[62] In the second case, a school psychologist suspended for not promptly reporting suspected sex abuse was held to have no cognizable section 1983 action for violation of due process and privacy.[63] The court observed that while "the federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information," the state reporting scheme does not pose a threat to right of confidentiality as a constitutional violation; and even if there were a federal right to confidentiality, the state has a compelling interest in protecting abused children.

Substantive Due Process

Although technically, plaintiffs are not entitled to substantive due process rights under the fourteenth amendment unless they are able to show they were deprived of a liberty or property interest (see next section), one case nevertheless held that a nontenured school employee had not shown proof that his nonrenewal was "arbitrary and capricious" (typical language in substantive due process cases).[64] Nor was the dismissal of a tenured administrator violative of substantive due process rights, because the findings of a fact-finding panel were supported by substantial evidence and, thus, not arbitrary.[65] In a section 1983 action by a high school student against school officials for the sexual abuse and harassment by the high school band director, a federal court denied defendant's motion for summary judgment relying in part on *Ingraham v. Wright*[66] which the court claimed recognized "a substantive right to be free from bodily abuse" that can be remedied through section 1983.[67]

PROCEDURAL DUE PROCESS

Except in the case of emergency suspensions with pay, the Constitution requires that employees who have "liberty" or "property"

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62. Patchogue-Medford Teachers Congress v. Board of Educ., 517 N.Y.S.2d 456, 460 (N.Y. 1987).

63. Pesce v. J. Sterling Morton High School Dist. 201, 830 F.2d 789, 797 (7th Cir. 1987).

64. Housley v. North Panola Consol. School Dist., 656 F. Supp. 1087 (N.D. Miss. 1987).

65. Lee v. Albemarle County School Bd., 648 F. Supp. 744 (W.D. Va. 1986).

66. 430 U.S. 651 (1977).

67. Stoneking v. Bradford Area School Dist., 668 F. Supp. 1088 (W.D. Pa. 1987).

interests must be afforded procedural due process before adverse employment actions affecting those interests are implemented.[68] Although the type of due process provided will vary with the nature and severity of the anticipated consequences, the essence of due process is notice and a fair opportunity to respond to the charges.

Before it is determined that due process is required, it must be demonstrated that the employee had a legitimate claim of entitlement to, for example, her job as a principal or his position as head football coach. An employee at will has no legitimate claim of entitlement to a position, and neither does an employee who is simply not rehired at the end of a term contract. An additional basis upon which to assert a claim to procedural due process arises when what the government is doing to an employee threatens to damage his reputation, honor or integrity, or standing in the community, particularly if it may foreclose future employment opportunities.

Liberty and Property Interests

In a classic case finding no property interest, first year probationary teachers were not rehired at the end of their contracts.[69] Property interests were also not shown in cases where a ROTC instructor had never applied for nor received the teaching certificate that might have entitled him to continuing contract status;[70] where a nontenured principal was not renewed (despite local policy suggesting a property interest);[71] where a seven-year board employee was not a "career service employee" under state law;[72] where a school custodian was a probationary employee;[73] where a teacher claimed a property right in her seniority, which was held modifiable under a collective bargaining agreement;[74] where the mere possession of a license was held not to entitle one to obtain a job;[75] where a principal's certificate was conditioned upon passing both written and oral exams;[76] and where school board records and minutes revealed inaction regarding authoriza-

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68. *See* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985).

69. Grimsley v. Board of Trustees, 235 Cal. Rptr. 85 (Ct. App. 1987). *See also* Housley v. North Panola Consol. School Dist., 656 F. Supp. 1087 (N.D. Miss. 1987) (nontenured director of vocational technical center had no property right that prevented his nonrenewal).

70. Montez v. South San Antonio Indep. School Dist., 817 F.2d 1124 (5th Cir. 1987).

71. Burk v. Unified School Dist. No. 329, 646 F. Supp. 1557 (D. Kan. 1986).

72. Lyman v. Strasburg, 647 F. Supp. 887 (N.D. Ill. 1986).

73. Bonacci v. Quinones, 508 N.Y.S.2d 42 (App. Div. 1986).

74. Carlson v. North Dearborn Heights Bd. of Educ., 403 N.W.2d 598 (Mich. Ct. App. 1987).

75. Lombard v. Board of Educ., 645 F. Supp. 1574 (E.D.N.Y. 1986).

76. Thomas v. Board of Examiners, Chicago Pub. Schools, 651 F. Supp. 664 (N.D. Ill. 1986).

tion of sick days in excess of the statutory limit.[77]

Courts did find property interests in cases where a probationary teacher was dismissed during the contract year;[78] and where an elementary school principal had been reassigned to the position of media specialist/librarian and was later being considered for a position comparable to her former position.[79] In the latter case, after an examination of state law, the court concluded that statutes gave rise to a "legitimate claim of entitlement" that prevented demotion without due process to a position with less responsibility, prestige, and salary. In another case once a property right had been created under a state statute requiring that suspension, demotion, or termination be "only for cause," an employee was entitled to a hearing to determine whether "cause" existed.[80] And likewise, a teacher who has been appointed for one and a half years as a principal was entitled to a hearing as to whether his status was permanent, temporary, or substitute.[81]

Where the existence of a liberty interest was at issue, courts held that none existed where there was no evidence of public disclosure of information that could affect the employee's good name or reputation;[82] where a former principal's personnel file contained the statement that he had failed to communicate effectively with faculty;[83] and where a teacher received unsatisfactory student performance ratings.[84] In the latter case, it was also held that the former principal did have a liberty interest in an ancillary charge that he had made inappropriate sexual comments to a female student—something that, if proven, could seriously affect his good name and future employment prospects.

In a case that illustrates the importance of a name-clearing hearing, an employee was granted such when he alleged the falsity of charges that he engaged in sexual misconduct with students.[85] A federal court of appeals reversed a district court's summary judgment, ruling that allegations that the charges were false, along with a showing of potential disclosure, were sufficient to implicate a liberty interest and to necessitate a hearing:

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77. Sublette v. Board of Educ. of Fulton County, 664 F. Supp. 265 (W.D. Ky. 1987).
78. Matthews v. Harney County School Dist. No. 4, 819 F.2d 889 (9th Cir. 1987).
79. Hatcher v. Board of Pub. Educ., 809 F.2d 1546 (11th Cir. 1987).
80. Goudeau v. Independent School Dist. No. 37 of Okla. County, 823 F.2d 1429 (10th Cir. 1987).
81. Botti v. Southwest Butler County School Dist., 529 A.2d 1206 (Pa. Commw. Ct. 1987).
82. Bonacci v. Quinones, 508 N.Y.S.2d 42 (App. Div. 1986); Noel v. Andrus, 810 F.2d 1388 (5th Cir. 1987).
83. Burk v. Unified School Dist. No. 329, 646 F. Supp. 1557 (D. Kan. 1986).
84. St. Louis Teachers Union, Local 420 v. Board of Educ. of City of St. Louis, 652 F. Supp. 425 (E.D. Mo. 1987).
85. Brandt v. Board of Coop. Educ. Servs., 820 F.2d 41 (2d Cir. 1987).

Occasionally, both property and liberty claims may be actionable. In one case, a tenured principal discharged for misconduct was entitled to a jury trial on issues of defamation, intentional infliction of emotional distress, and economic harm caused by coercion to resign.[86]

Aspects of Notice

Although employees subject to adverse employment decisions often will be entitled to actual notice that is sufficient to allow the preparation of a defense, the following cases illustrate that notice will be deemed adequate if it does not prejudice the employee. Notice was held not prejudicial when the notice of the hearing also purported to immediately dismiss the employee,[87] and where written notice received more than twenty days prior to a hearing did not list the witnesses, as required by state law: the plaintiff nevertheless knew of the witnesses.[88] Likewise, a discharged school security guard who had checked "No" on his application regarding conviction for a felony had adequate notice when he knew at first meeting with his supervisor the application falsehood was at issue.[89]

A dismissed custodian was held to have received inadequate notice when it did not specify the nature of the complaint against him and when he was not given the statutory eight days to prepare a defense.[90] In another case, notice was simply not provided as required by law: notice, reasons, and witnesses were held necessary before an employee demoted as part of a reduction-in-force could be denied appointment to a position comparable to that which she had held previously.[91]

Aspects of Hearing

Hearings were held legally adequate in cases where a school board adopted the findings of a fact-finding panel (convened pursuant to state law) because the board was not holding a second hearing, nor was the plaintiff entitled to such;[92] where seven hours of recorded testimony (including witnesses for the plaintiff) effectively negated the claim that plaintiff did not have a right to be heard;[93] and where evidence showed

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86. Sullivan v. Board of Educ. of the Eastchester Union Free School Dist., 517 N.Y.S.2d 197 (App. Div. 1987).

87. Combs v. Board of Educ., 498 N.E.2d 806 (Ill. App. Ct. 1986).

88. Meyers v. Sabine Parish School Bd., 499 So. 2d 690 (La. Ct. App. 1986). *See also* Covert v. Bensalem Township School Dist., 522 A.2d 129 (Pa. Commw. Ct. 1987) (adequate notice was given to teacher convicted of criminal offense).

89. Loudermill v. Cleveland Bd. of Educ., 651 F. Supp. 92 (N.D. Ohio 1986).

90. Rudy v. Board of Educ., 513 N.Y.S.2d 804 (App. Div. 1987).

91. Hatcher v. Board of Pub. Educ., 809 F.2d 1546 (11th Cir. 1987).

92. Lee v. Albemarle County School Bd., 648 F. Supp. 744 (W.D. Va. 1986).

93. Westley v. Terrebome Parish School Bd., 656 F. Supp. 499 (E.D. La. 1987).

that a hearing officer based the dismissal decision on evidence independently assessed.[94] In the latter case, it also was held that rendering the decision within a thirty day time period was not a mandatory provision of state law. In addition, a hearing was proper where one member of a law firm represented the school district in opposing plaintiff's unemployment claim and a different member of the firm served as legal counsel to the committee that held his termination hearing;[95] where the hearing officer (also the school district attorney) had general information on the charges, but no specific facts, and there was no evidence of bias;[96] where a teacher was given an opportunity to explain his side of the facts prior to being suspended for three days;[97] and where a teacher discharged as a police officer under city charter prohibiting multiple employment was entitled only to an informal hearing since the city charter was unequivocal and nondiscriminatory.[98]

In another case, lack of documentary support for the decisions and irregularities in the hearing procedures rendered a hearing inadequate.[99] However, in the same hearing, it was held that the fact that one board member excused herself without explanation and another did embroidery throughout the hearing did not violate plaintiff's due process rights. Hearings were violative of due process in two additional cases where evidence suggested that board members were biased or had prejudged the case.[100] And in a final case, a hearing was mandated that would give the plaintiff the opportunity to respond orally and in writing in order to rebut the failure to place her in a position comparable to one she had previously held.[101]

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

State statutes, local board policies, and local collective bargaining contracts outline the procedures that must be followed and the charges

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94. Combs v. Board of Educ., 498 N.E.2d 806 (Ill. App. Ct. 1986).

95. Cortes v. Western Montgomery County Vocational-Technical School, 530 A.2d 1029 (Pa. Commw. Ct. 1987).

96. Gioe v. Board of Educ. of East Williston School Dist., 511 N.Y.S.2d 129 (App. Div. 1987).

97. Jones v. Board of Educ. of Township High School Dist. No. 211, 651 F. Supp. 760 (N.D. Ill. 1986).

98. Williams v. City of Pittsburgh, 531 A.2d 42 (Pa. Commw. Ct. 1987).

99. Taborn v. Hammonds, 350 S.E.2d 880 (N.C. Ct. App. 1986).

100. Ferrario v. Board of Educ., 395 N.W.2d 195 (Mich. 1986) (board's participation in investigating or accusing teacher prior to hearing suggested bias); Alabama State Tenure Comm'n v. Conecuh County Bd. of Educ., 495 So. 2d 1105 (Ala. Civ. App. 1985) (board had prejudged employee in wake of community unrest concerning performance).

101. Hatcher v. Board of Pub. Educ., 809 F.2d 1546 (11th Cir. 1987).

or penalties that may be levied when employees are subjected to many types of adverse employment actions. Not all actions that an employee may consider "adverse," however, will be covered under these statutes, policies, and contracts. For example, transfers that do not amount to a demotion (where there is less prestige, responsibility, and a lower salary), and reprimands that are placed in an employee's file, often will not be the subject of state or local provisions. Assuming that these actions implicate no liberty or property interests (or claim that procedural due process has not been afforded), state and local law will govern.

In the case of dismissal, state law usually specifies that tenured teachers may be dismissed for insubordination, unprofessional conduct, unfitness, willful neglect of duty, immorality, insubordination, incompetence, or "other good cause." While the language may vary from state to state, the grounds and procedures for dismissal will be stated in law.

Unless provided for at the state or local level, decisions not to renew an employee's contract do not require due process procedures and no reasons need be given. In the unusual case where a nontenured employee provides evidence that the nonrenewal was in retaliation for the exercise of constitutionally protected rights, or where the employee can demonstrate another liberty interest, due process will be necessary.

Because adverse employment actions, especially dismissals, can be based on a number of overlapping charges, the cases in the following sections have been grouped according to the major charge involved and generally are not repeated in other sections. As has been true for a number of years, there are more cases in the section on compliance with state and local policies than in any one other section, suggesting the need to review these policies before implementing adverse employment actions.

Insubordination

The dismissal of tenured teachers for insubordination was upheld in cases where a teacher refused to take part in hall duty (claiming a right to free speech);[102] where a male teacher refused the superintendent's directive to stop living with a male student who attended school in the district (an additional charge in this case was "conduct unbecoming");[103] where a teacher refused to meet requirements of a remediation plan to produce reports on a specified time schedule;[104] and where a coach used

102. Lockhart v. Arapahoe County School Dist. No. 6, 735 P.2d 913 (Colo. Ct. App. 1986).

103. Weaver v. Board of Educ., 514 N.Y.S.2d 473 (App. Div. 1987).

104. de Oliveira v. State Bd. of Educ., 511 N.E.2d 172 (Ill. App. Ct. 1987).

volunteer noncertified coaches on sidelines during games contrary to school rules.[105]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

In almost all of the cases where tenured teachers were dismissed for the type of conduct considered in this section, their dismissals were upheld. Teachers in separate cases arising in New York State were dismissed for altering their students' scores on state-wide examinations.[106] Other in-class conduct for which terminations were upheld included showing an uncut R-rated movie;[107] and striking children "about the head" instead of on the "fleshy posterior" and in the presence of the principal, as required by board policy.[108] In addition, a licensed practical nurse employed at a state facility for orthopedically handicapped persons was properly fired for unauthorized use of an aversive behavior-control technique, *viz.*, spraying a client with cold water.[109] A school employee terminated and arrested for using the school phone to make nonreimbursed personal long distance phone calls did not have a claim for malicious prosecution.[110] Similarly school employees' terminations were upheld for making personal purchases using the school's tax exempt status[111] and for mismanagement of public school funds.[112] On the other hand, a teacher absent due to legitimate, involuntary illness and who had exhausted her sick leave benefits could not be terminated for willful violation of school policies.[113]

With regard to conduct outside of the educational realm, teacher dismissals were upheld for failure to pursue graduate work in English during a leave period;[114] for reporting by means of a notarized affidavit that a teacher was sick when he actually drove a coal truck from Kentucky to Ohio;[115] for improprieties with two minor students and

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105. King v. Elkins Pub. Schools, 733 S.W.2d 417 (Ark. Ct. App. 1987).

106. Carangelo v. Ambach, 515 N.Y.S.2d 665 (App. Div. 1987); Carlan v. Lawrence Union Free School Dist. Bd. of Educ., 513 N.Y.S.2d 202 (App. Div. 1987) (additional charges included insubordination, failure to prepare and grade certain tests, and neglect of duty).

107. Fowler v. Board of Educ. of Lincoln County, 819 F.2d 657 (6th Cir. 1987).

108. Shepard v. South Harrison R-II School Dist., 718 S.W.2d 195 (Mo. Ct. App. 1986).

109. Juneau v. Louisiana Bd. of Elementary and Secondary Educ., 506 So. 2d 756 (La. Ct. App. 1987).

110. Herrold v. State School for Deaf and Blind, 732 P.2d 379 (Idaho Ct. App. 1987).

111. Foderaro v. School Dist. of Philadelphia, 531 A.2d 570 (Pa. Commw. Ct. 1987).

112. Marcotte v. Aroyelles Parish School Bd., 512 So. 2d 538 (La. Ct. App. 1987).

113. Equi v. Board of Educ. of Grand Rapids Pub. Schools, 412 N.W.2d 296 (Mich. Ct. App. 1987).

114. Stansberry v. Argenbright, 738 P.2d 478 (Mont. 1987).

115. Board of Educ. v. McCollum, 721 S.W.2d 703 (Ky. 1987).

inviting them to an adult party and then having them drink beer and smoke marijuana;[116] and for being convicted in the hit-and-run death of a teenager who was riding a bicycle.[117] In the latter case, it was held that evidence that the accident was a result of negligent rather than intentional action was nevertheless sufficient to support a dismissal for "conduct unbecoming" (even though the court suggested that it *might* not have been sufficient for a charge of moral turpitude). Termination of a teacher who pleaded guilty to embezzling from a corporation formed with two other teachers was upheld because the court reasoned that his continued presence in the small school system would result "in faculty disorder and an unsatisfactory learning environment."[118] A teacher's resignation with the school providing one month severance pay after pleading guilty to a theft charge was upheld as a valid contract when the teacher later withdrew the plea and the theft charge was dismissed.[119]

Nonteaching employees fared better in adverse employment actions in this section. A school secretary who left school an hour early to attend a football game with the band director, whom she was dating, was held not guilty of "flagrant misconduct."[120] Also, the conviction of a custodian for petty theft committed off school grounds was held not to provide a sufficient "rational nexus" to school duties to support dismissal, although it was sufficient to sustain a two-year suspension.[121] The last case involved several mitigating factors, including the custodian's voluntary admission of his crime, the return of the stolen property, and his good work record.

Immorality

Cases reported in 1987 overwhelmingly supported the dismissal of tenured teachers for immorality and related charges. Sexual misconduct with students continued to be a problem, as did drug-related activity. One male teacher was dismissed for fondling two elementary school students, and another was dismissed for behaving in a sexually suggestive way toward female students.[122] In the former case, the court held the effect of the teacher's conduct to be irremediable, even if the

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116. Barcheski v. Board of Educ. of Grand Rapids Pub. Schools, 412 N.W.2d 296 (Mich. Ct. App. 1987).

117. Ellis v. Ambach, 508 N.Y.S.2d 624 (App. Div. 1986).

118. *In re* Shelton, 408 N.W.2d 594 (Minn. Ct. App. 1987).

119. Booth v. Argenbright, 731 P.2d 1318 (Mont. 1987).

120. OSEA v. Pendleton School Dist. 16R, 736 P.2d 204 (Or. Ct. App. 1987).

121. Waugh v. Board of Educ., 350 S.E.2d 17 (W. Va. 1986).

122. Fadler v. Illinois State Bd. of Educ., 506 N.E.2d 640 (Ill. App. Ct. 1987); Scott County School Dist. 2 v. Dietrich, 499 N.E. 1170 (Ind. Ct. App. 1986).

conduct itself would not be repeated. The teacher had effectively damaged the reputation of the faculty and the district and had caused psychological harm to the students. In another case, a tenured teacher was dismissed for touching girls, initiating conversations with girls they found embarrassing, and attempting to arrange meetings with female students after school hours.[123] In a drug case, two brothers who were teachers were properly dismissed for smoking marijuana at their apartment with two teenage, female students.[124] The court held that although "[i]t was not the intention of the legislature to subject every teacher to discipline or dismissal for private shortcomings that might come to the attention of the Board . . . but have no relation to the teacher's involvement or example to the school community," in this case a "nexus" was shown.[125]

Other in-school activity supporting dismissal occurred when a fifth grade teacher used an "obscenity" (F--- Y--) in class, and when a basketball coach struck team members with a stick and a paddle, in violation of the district's corporal punishment policy, and knowingly began basketball practice prior to the official start of the season.[126] In the former case, it was held that the use of the language in question created an inappropriate role-model, violated community standards of conduct, and damaged the teacher's effectiveness (six out of twenty-four children testified that they heard the language).

Other dismissals were supported based on evidence of conviction for harassment by communication or address and a plea of nolo contendere to charges of possession of $500 worth of stolen materials used to build a house.[127] In two other cases involving immorality, courts upheld school board terminations after there had been "a blizzard of oral and written communications" on behalf of the teachers' character[128] and where a public outcry led to a teacher's "resignation" because of an alleged homosexual relationship with another teacher.[129]

Incompetence

Among several miscellaneous cases of incompetence were cases

123. Graziano v. Board of Amherst Exempted Village School Dist., 513 N.E.2d 282 (Ohio 1987).

124. Board of Educ. v. Wood, 717 S.W.2d 837 (Ky. 1986).

125. *Id.* at 840.

126. Fiscus v. Board of School Trustees, 509 N.E.2d 1137 (Ind. Ct. App. 1987); Alabama State Tenure Comm'n v. Birmingham Bd. of Educ., 500 So. 2d 1155 (Ala. Civ. App. 1986).

127. Covert v. Bensalem Township School Dist., 522 A.2d 129 (Pa. Commw. Ct. 1987).

128. Melrose Mun. School Bd. of Educ. v. New Mexico State Bd. of Educ., 740 P.2d 123, 124 (N.M. Ct. App. 1987).

129. Conway v. Hampshire County Bd. of Educ., 352 S.E.2d 739 (W. Va. 1986).

where a school librarian's poor performance of newly assigned duties as the audiovisual coordinator (rather than the grievance she filed) was the reason for her nonrenewal;[130] where a teacher failed to prepare daily written lesson plans and develop a general semester outline of courses in two week blocks;[131] where one custodian was dismissed for sleeping on a shop table while on duty[132] and another was dismissed for failure to maintain the boilers; [133] where a teacher's classroom was "littered with sunflower seeds, paper, and junk and whose classroom walls and furniture were . . . covered with graffiti;"[134] and where a teacher under state law was totally disabled and unable to work because of a work-related injury.[135]

In one additional case an instrumental music teacher was "transferred" to a position as a full-time proctor, after several attempts had been made to help him remediate his teaching and after two negative outside reviews of the instrumental music program.[136] Although the court held that the transfer was in fact a dismissal requiring due process, it upheld the action of the board in freezing the teacher's salary for a five-year period. Reducing the salary was not unreasonable nor was it a "reduction" requiring notice and a hearing.

Compliance with School Board Policies and State Statutes

Most of the cases in this section illustrate the importance of considering and abiding by state statutory law in the implementation of adverse employment decisions, in the case of school boards, or in defending against such actions, in the case of the employees affected. Among the relatively few cases where boards were successful in defending their procedures were cases where an administrative evaluation was held not to amount to a "formal reprimand" subject to state due process requirements;[137] where a teacher was held properly nonrenewed, despite the fact that the statutorily required written evaluation was received twelve days late (held not a condition precedent to nonrenewal);[138] where a bus driver was properly fired by the district's

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130. Robinson v. Lebanon City School Dist. Bd. of Educ., 503 N.E.2d 541 (Ohio Ct. App. 1985).

131. Rogers v. Department of Defense Dependents Schools, 814 F.2d 1549 (Fed. Cir. 1987).

132. Smith v. Board of Educ., 510 N.Y.S.2d 29 (App. Div. 1986).

133. Crillo v. Board of Educ., 508 N.Y.S.2d 784 (App. Div. 1986).

134. Board of Educ. of School Dist. of Philadelphia v. Kushner, 530 A.2d 541 (Pa. Commw. Ct. 1987).

135. State v. Lillard, 521 A.2d 1110 (Del. Super. Ct. 1986).

136. Hansen v. Board of Educ., 502 N.E.2d 467 (Ill. App. Ct. 1986).

137. Tebordo v. Cold Springs Harbor Cent. School Dist., 510 N.Y.S.2d 665 (App. Div. 1987).

138. Moran v. Board of School Trustees, 501 N.E.2d 472 (Ind. Ct. App. 1986).

director of business services because authority to fire was held to be delegable by the board when accompanied by specific standards;[139] where only four of eleven charges against a teacher met statutory criteria for termination but were sufficient to support insubordination;[140] where a school bus driver failed to report a bus accident;[141] where a sixty-day statutory notice for nonrenewal of a nontenured teacher was met by counting a teacher institute day;[142] and where six teachers ignored the principal's warning about "no water" on a field trip where a sixth grade student drowned.[143] A school board was not prohibited from proceeding to terminate a teacher for the same act of misconduct even though a prior effort at termination had been set aside because of a procedural error.[144]

State law was violated in the majority of cases where issues of this type were considered. Illustrating the importance of abiding by statutory procedures is a case where a "long-term substitute" teacher, who had been employed for a year as a teacher and track coach, was reinstated in both positions because of the board's failure to give notice of nonrenewal by April 13th.[145] Additional cases concerned the necessity of a hearing before a demotion from language arts coordinator to classroom teacher;[146] the attempted nonrenewal of a principal who had the statutory procedural rights of a teacher;[147] the preclusion of immediate dismissal for behavior insulting and demeaning to students because of the lack of a written warning (and, thus, an opportunity for remediation);[148] the invalidation of suspension of a school nurse where the one charge was remediable under state law;[149] the necessity of a hearing before a reduction in a lunchroom worker's hours from thirty-five to thirty, which the court considered a partial termination of employment;[150] the invalidation of a three-day suspension that was held

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139. Fremont RE-1 School Dist. v. Jacobs, 737 P.2d 816 (Colo. 1987).
140. Smith v. Normandy School Dist., 734 S.W.2d 943 (Mo. Ct. App. 1987).
141. Sutherland-Wagner v. Brook Park Civil Serv. Comm'n, 512 N.E.2d 170 (Ohio 1987).
142. Howard v. Board of Educ. of Freeport School Dist., 513 N.E.2d 545 (Ill. App. Ct. 1987).
143. Westbrook v. Board of Educ. of City of St. Louis, 724 S.W.2d 698 (Mo. App. Ct. 1987).
144. Board of Educ. of Santa Fe Pub. Schools v. Sullivan, 740 P.2d 119 (N.M. 1987).
145. State v. Board of Educ., 503 N.E.2d 748 (Ohio 1986).
146. Ellis-Adams v. Whitfield City Bd. of Educ., 356 S.E.2d 219 (Ga. Ct. App. 1987).
147. Littky v. Winchester School Dist., 529 A.2d 399 (N.H. 1987).
148. Beranek v. Joint Indep. School Dist. No. 287, 395 N.W.2d 123 (Minn. Ct. App. 1986).
149. Board of Educ. of City of Chicago v. Illinois State Bd. of Educ., 513 N.E.2d 845 (Ill. App. Ct. 1987).
150. Ledbetter v. Jackson County Bd. of Educ., 508 So. 2d 244 (Ala. 1987).

beyond the power of the superintendent acting apart from the board;[151] and the necessity of a proper hearing when two female school principals were accorded a hearing but were not given specific instances to support the general charges against them and were not permitted to present witnesses or cross-examine witnesses.[152] In yet another case, the dismissal of a teacher for engaging in a general strike was reversed because of improper reliance on the civil service regulations instead of the education regulations.[153] In two other cases, a teacher could not be prosecuted under the state child neglect and abuse statute because she was not a "custodian,"[154] and a tenured teacher given one year to improve her teaching, and four evaluation dates, could not be terminated when she was granted health leave before the four dates expired.[155]

In addition to relying on the appropriate state law, it is important to be assured that local policies are not inconsistent with state law. Illustrating the application of this principle is a case where a school board attempted to discharge a teacher for missing over ninety school days, beyond accumulated sick leave, over a two-year period.[156] The court held that application of the board's policy was inconsistent with state law protecting teachers who were temporarily physically incapacitated. Although the board had the right to define "temporary illness," it could not "define it out of existence." Whether a superintendent was authorized by the school board to dismiss an employee is a factual question for the jury when only the board has authority to dismiss.[157] A school board which could offer no evidence that it had adequately published its new policy against school employees working while on sick leave could not enforce that policy against a teacher.[158]

Two cases illustrate that employees also may ignore state statutory provisions at their peril—one where a custodian's dismissal was upheld for not following the administrative review process, and another where a teacher's dismissal was upheld for not seeking a hearing within thirty days of her dismissal (proffered physical and emotional problems were not sufficiently demonstrated).[159]

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151. North East Community Bd. of Educ. v. North East Community School Dist., 402 N.W.2d 765 (Iowa 1987).

152. DeSoto County School Bd. v. Garrett, 508 So. 2d 1091 (Miss. 1987).

153. Brown v. Civil Serv. Comm'n, 818 F.2d 706 (11th Cir. 1987).

154. West Virginia Dep't of Human Servs. v. Boley, 358 S.E.2d 438 (W. Va. 1987).

155. Perron v. Royal Oak School Dist. Board of Educ., 400 N.W.2d 709 (Mich. Ct. App. 1986).

156. School Dist. 151 Bd. of Educ. v. State Bd. of Educ., 507 N.E.2d 134 (Ill. Ct. App. 1987).

157. Smith v. Greater Amsterdam School Dist., 512 N.Y.S.2d 584 (App. Div. 1987).

158. Cowdery v. Board of Educ. of School Dist. of Philadelphia, 531 A.2d 1186 (Pa. Commw. Ct. 1987).

159. Pettway v. Mobile County Bd. of School Commr's, 495 So. 2d 1056 (Ala. 1986); Kimble v. Los Angeles City Bd. of Educ., 238 Cal. Rptr. 160 (Ct. App. 1987).

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

Although it is commonly thought that tenure entitles one to a teaching position for life (absent the type of "just cause" for dismissal discussed in the previous section), legitimate dismissals can result from the necessary consolidation of districts, reorganization within a district, or programmatic reorganization within a school. Whether a reduction-in-force (RIF) is based on legally sufficient reasons, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state law: state tenure or other relevant statutes, local board policies, and/or collective bargaining agreements. Because of statutes, policies, and agreements governing RIF, affected employees usually do not have the legitimate claim of entitlement to positions that would necessitate the application of constitutional due process procedures; however, where state law specifies the procedures to be followed and the substantive criteria to be used, these mandates must be followed. (Several cases illustrate the further proposition that statutory law controls in case of conflict with local mandates.) In addition, in the unusual case where an employee makes a prima facie claim that RIF was a subterfuge for the exercise of constitutional rights, due process often will be necessary.

Necessity for Reduction-in-force

Illustrating legitimate and illegitimate reasons for RIF of a tenured teacher was a case where a cut in federal funding for the program in which the teacher was working was held to be insufficient justification for a RIF.[160] The only legitimate reasons, as reviewed by the court, were a substantial decrease in enrollment, the consolidation of schools or districts, the reorganization of districts, or the alteration of programs as approved by the state department of public instruction. In another case a tenured plaintiff-teacher granted under a professional agreement an honorable discharge for "discernible differences" during a reduction-in-force, while another teacher with less continuous service was retained, was entitled to reinstatement.[161] Because plaintiff had essentially been discharged for "incompetency," state law stipulated that dismissal for other than "economic necessity" required remediation, if the deficiencies were remediable, and prohibited a professional agreement from eliminating statutory dismissal procedures.

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160. Altoona Area Vocational Technical School v. Pollard, 520 A.2d 99 (Pa. Commw. Ct. 1987).

161. Schafer v. Arlington Heights Bd. of Educ., 510 N.E.2d 1186 (Ill. App. Ct. 1987).

The cases in the following subsection, in addition to dealing with the elimination of a position or positions, illustrate additional problems concerning "necessity."

Elimination of Position

In an unusual case affecting a nontenured teacher, who was not renewed for legitimate budgetary reasons following maternity leave, the court held that state statutes permitting the nonrenewal of nontenured teachers, in these circumstances, overrode the collective bargaining agreement.[162] Although the agreement said that teachers would be reinstated following maternity leave, since all nontenured teachers were laid off, the agreement was read to grant no additional rights to teachers who happened to be on maternity leave.[163] However, in another case a custodial employee, whose contract was terminated because the school district anticipated a deficit (which state law prohibited) was entitled to reinstatement.[164] The court relied on a narrow interpretation of state law which provided teacher contracts to be terminated for inability to meet financial obligations but did not require contracts for noninstructional employees; however, once a contract was issued to such an employee the school district had to abide by its terms.

A school district was justified in terminating a teacher for program elimination even though the teacher was kept on for one more year to cover for another teacher on leave of absence.[165] In another case a school board could RIF a teacher hired to teach an area that was eliminated even though teachers with less seniority were retained in other similar areas.[166]

A school board was unsuccessful in claiming a necessary RIF of a guidance counselor who "got crossways politically" with the board and superintendent (by campaigning against their retention).[167] Because no evidence suggested the need for fewer guidance counselors, the court concluded that the proffered reason for dismissal was a sham which violated the counselor's first amendment right to free speech. Also unsuccessful was a board's thinly disguised effort to save $6,000 by making a minor curriculum change, laying off a tenured teacher, and hiring an untenured teacher;[168] and the additional attempted dismissal

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162. Bevsek v. Huerfano School Dist. RE-1, 728 P.2d 325 (Colo. Ct. App. 1986).
163. *Accord* Murphy v. Pierre Indep. School Dist. No. 30-2, 403 N.W.2d 418 (S.D. 1987).
164. Calico Rock School Dist., No. 50 v. Speak, 736 S.W.2d 10 (Ark. 1987).
165. O'Connor v. Wattsburg Area School Dist., 520 A.2d 1266 (Pa. Commw. Ct. 1987).
166. Law v. Mandan Pub. School Dist., 411 N.W.2d 375 (N.D. 1987).
167. Clairborne County Bd. of Educ. v. Martin, 500 So. 2d 981 (Miss. 1986).
168. Hein v. Board of Educ., 733 P.2d 1270 (Kan. Ct. App. 1987).

of a tenured teacher, without statutorily mandated due process rights, because of a claimed bona fide elimination of a position.[169]

Selection of Employees

When employees are selected for RIF, it is necessary for the board to carefully consider applicable criteria, follow applicable procedures, and document the particular choices.[170] In a case where a less senior teacher was retained because the board believed the teacher to be more qualified, the court held that the reason was irrelevant where the statute mandated that only licensure and seniority be considered.[171] Likewise, a tenured secondary physical education teacher whose certification included both secondary and elementary physical education, but who had never taught elementary, was entitled to displace an elementary teacher.[172] A teacher nonrenewed when her reading program was discontinued was ordered reinstated by a new administrator.[173] A teacher on unpaid leave of absence who had expressed an intention to return did not create a vacancy under state law where the teacher was not shown to be suffering from a serious illness.[174]

Teachers were unsuccessful in claiming their selection was improper in a number of cases, and for various reasons. A teacher of landscape technology challenged his placement on requested leave in favor of another teacher he claimed was less senior.[175] The court held, however, that the other teacher was entitled per statute to five years seniority credit for an extended leave, despite a local collective bargaining agreement to the contrary. Similarly, a teacher suspended because of declining enrollments was unsuccessful in challenging retention of another teacher who had more seniority because military service had been applied to the front of teacher service.[176] A tenured physical education teacher, laid-off because of a necessary staff reduction, did not prove that a more senior physical education teacher (who had been on personal-professional leave for two years) had intended to give up

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169. Hillhouse v. Rice School Dist. No. 20, 727 P.2d 843 (Ariz. Ct. App. 1986).

170. Taborn v. Hammonds, 350 S.E.2d 880 (N.C. Ct. App. 1986) (remand necessary for appropriate procedures).

171. Beste v. Independent School Dist. No. 697, 398 N.W.2d 58 (Minn. Ct. App. 1986).

172. Capodilupo v. Board of Educ. of Township of West Orange, Essex County, 528 A.2d 73 (N.J. Super. Ct. App. Div. 1987).

173. Indiana Civil Rights Comm'n v. Culver Educ. Found., 510 N.E.2d 206 (Ind. Ct. App. 1987).

174. Dionsio v. Board of Educ. of Mahopac Cent. School Dist., 512 N.Y.S.2d 457 (App. Div. 1983).

175. Urdahl v. Independent School Dist. No. 181, 396 N.W.2d 244 (Minn. Ct. App. 1986).

176. Rochester Area School Bd. v. Duncan, 529 A.2d 48 (Pa. Commw. Ct. 1987).

his tenure rights.[177] A registered nurse employed by a school district for two years prior to the hiring of a second school nurse was legitimately reduced to three-fifths time because she did not possess a "school service personnel certificate."[178] Although the plaintiff eventually became certified—without statutory obligation to do so—she gained tenured status two years after certification and one year following the tenure of the other nurse. Where a third grade teacher was terminated because of budgetary considerations, the superintendent was permitted under state law, for purposes of determining seniority among elementary teachers, to segregate out a special education teacher, an art teacher, a learning disabilities teacher, a chapter I teacher and a music teacher.[179] When one school was merged with another, the black principal of the merging school who lost his job, while the white principal of the merged school was retained, failed in establishing disparate treatment under RIF criteria because the "employer did not seek another person to perform the same work."[180] In the final case, the retrenchment due to declining enrollments led to plaintiff's lay-off—an action she argued was against the state's law that "professional employees" should be laid off in reverse order of appointment.[181] Her lay-off was held proper, however, because although her appointment letter stated she was hired as a "professional employee," the school board minutes (which were controlling) said she was hired as a "permanent substitute."

Realignment/Reassignment

For purposes of realignment, supervisors are generally considered teachers and may, if they are senior, force the realignment or lay-off of less senior teachers; however, they may not force their own realignment "up" to administrative positions. Cases illustrating this proposition concerned supervisors with greater seniority than classroom teachers who properly were permitted under state statute to bump teachers despite their lack of teaching experience within the district;[182] a supervisor of special education who was not permitted to bump either of two nontenured administrators (who held noninstructional rather

177. Giordano v. Ambach, 509 N.Y.S.2d 203 (App. Div. 1986).
178. Verdeyen v. Board of Educ., 501 N.E.2d 937 (Ill. App. Ct. 1986).
179. Pochahontas Community School Dist. v. Levene, 409 N.W.2d 698 (Iowa Ct. App. 1987).
180. Gilyard v. South Carolina Dep't of Youth Servs., 667 F. Supp. 266, 270 (D.S.C. 1985).
181. Clapsaddle v. Bethel Park School Dist., 520 A.2d 537 (Pa. Commw. Ct. 1987).
182. Evans v. Independent School Dist. No. 281, 396 N.W.2d 616 (Minn. Ct. App. 1986) (it was only necessary that the supervisors be licensed in the field where they were realigned).

than supervisory positions);[183] and an employee with previous administrative experience and seniority who unsuccessfully argued that he should be promoted (he said "realigned") to the newly vacated junior high school principal's position.[184] In the latter case, the court ruled that realignment did not apply where a professional was being promoted, but only where employees were being suspended, dismissed, or demoted.

Realignment may involve more than just bumping to protect seniority rights. Under one state's tenure statute "realignment involves shifting positions and reassignments of a *more* senior teacher to accommodate a *less* senior teacher so that the *least* senior teacher is eventually laid off or placed on unrequested leave of absence."[185]

A case where the positions of superintendent and secondary principal were combined resulted in a realignment problem for an elementary school administrator, who was reassigned to a teaching position while a less senior administrator was named to the new combined position.[186] The court held that state law did not require a consideration of seniority in filling the superintendent's position and that a district's needs can be considered in combining two half-time positions rather than separating them.

In a case where subject-matter seniority was relevant, according to local contract, a carpentry teacher was permitted to contest the time of his replacement's licensure in carpentry—this despite a prior decree affirming the plaintiff's placement on unrequested leave.[187]

A case illustrating the general rule that certification rather than teaching experience controls in situations involving realignment, a teacher of science was entitled by her seniority to a reading position despite her lack of experience.[188] In the same case, it was held that an English teacher with less seniority than suspended teachers was allowed to maintain her job because of her additional duties as coordinator of the gifted and talented program. The case suggests that additional duties that would make it impractical to replace teachers may sometimes insulate them from layoff, even if they are junior.

A transfer from principal of a junior high to assistant principal of a high school may be considered a demotion so as to require a hearing.[189]

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183. Wooten v. DeKalb City Bd. of Educ., 504 So. 2d 280 (Ala. Civ. App. 1986).
184. Ginocchi v. Burrel School Dist., 522 A.2d 707 (Pa. Commw. Ct. 1987).
185. Westgard v. Independent School Dist. No. 745, 400 N.W.2d 341, 345 (Minn. Ct. App. 1987).
186. Buys v. Independent School Dist. No. 891, 398 N.W.2d 622 (Minn. Ct. App. 1986).
187. Pirrotta v. Independent School Dist., No. 347, Willmar, 396 N.W.2d 20 (Minn. 1986).
188. Dallap v. Sharon City School Dist., 524 A.2d 546 (Pa. Commw. Ct. 1987).
189. Walsh v. Sto-Rox School Dist., 532 A.2d 547 (Pa. Commw. Ct. 1987).

But an assignment to teach different subjects at the same school and to the same grade would not be a transfer necessitating a hearing.[190]

Call-back Rights

Employees who have been placed on involuntary leaves of absence usually retain, as a matter of state law, limited call-back rights (i.e., the right to return to a position for which they are qualified, within a limited period of time providing that they have preserved their rights). A laid-off teacher, who in 1977 declined a recall to his former district because he was working in a new district, was held to have abandoned his recall rights by 1980 (when he finally sought to assert them) because of his failure to annually notify the district of his continuing interest in recall.[191]

A case that illustrates the inappropriate use of the call-back concept concerned a part-time, tenured kindergarten teacher (who had never been laid-off) who claimed that the board was obligated to hire her to the first available full-time position.[192] The teacher was not "laid off" when she was not given the full-time position; thus, call-back rights did not attach and the board could hire a probationary teacher for the position.

If state statute requires a preferential hiring list to be maintained for call-back purposes then a teacher's statutory rights have been violated when available positions have occurred and the preferential hiring list has not been used.[193] Special problems may arise when call-back rights are considered in a school district under a desegregation order. In one case a federal district court tailored a remedy permitting a one-time affirmative recall of black faculty "to the extent they were disproportionately laid off."[194]

CONTRACT DISPUTES

Many types of problems can arise concerning the contract of employment including the validity of the contract; the inclusion of ancillary administrative, statutory, collective bargaining, and other provisions; and questions regarding breach of contract. A valid contract is formed when there has been an offer, an acceptance of the offer

190. Robertson v. Alabama State Tenure Comm'n, 513 So. 2d 636 (Ala. Civ. App. 1987).

191. Tomiak v. Hamtramck School Dist., 397 N.W.2d 770 (Mich. 1986).

192. Poland v. Grand Ledge Pub. School Bd. of Educ., 402 N.W.2d 70 (Mich. Ct. App. 1986).

193. Randall v. Hawkins, 733 S.W.2d 871 (Tenn. 1987).

194. Little Rock School Dist. v. Pulaski County Special School Dist., 663 F. Supp. 1557, 1559 (E.D. Ark. 1987).

(before the offer is withdrawn), and "consideration" (usually a promise to work for a fixed salary). Although employment contracts usually are fixed in writing, they need not be; and very often additional provisions are incorporated into the contract by reference. The cases that follow illustrate the variety of problems which arise concerning employment contracts and other contractual rights and responsibilities that arise in education.

Board Policies and Contract Stipulations

Illustrative of cases holding that no valid contract had been created was the case of a dismissed superintendent. The court held that he was eligible for an impartial hearing under the teacher tenure law, in part, because a statement in the board minutes extending his contract for three years (which would have precluded application of the hearing provisions) was not sufficient to establish a contract.[195]

One case illustrates that, as in many other situations, it often is necessary to exhaust administrative remedies before bringing a breach of contract action. Where a school counselor received a written admonition and was transferred to a new position, the counselor's suit for breach of contract was precluded because of failure to exhaust the administrative remedies outlined in the collective bargaining agreement.[196]

A contract was held not breached, where the hours of an instructional aide were reduced from six to five; the contract was held to be subject to the district's policy manual. The manual stated that the employment contract could be terminated by either party, which the court held included the power to modify.[197] A school board's use of cumulative absence reserve days to offset a teacher's absences due to personal illness was not an arbitrary and capricious enforcement of its policies, even though such reductions had not been done for the prior three school years.[198] Also not breached was the employment contract of an English teacher who, because of problems she was having with discipline, was put "under a formal evaluation system" for her third year of teaching and subsequently not renewed. The fact that the principal had conducted three observations and made three written evaluations using a form he had developed was held sufficient to rebut a breach of contract claim (for lack of formal evaluation).[199]

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195. Mariani v. School Directors of Dist. 107, 506 N.E.2d 981 (Ill. App. Ct. 1987).
196. Lew v. Seattle School Dist. No. 1, 736 P.2d 690 (Wash. Ct. App. 1987).
197. Ohlemeier v. Community Consol. School Dist. No. 90, 502 N.E.2d 1312 (Ill. App. Ct. 1986).
198. Page v. Macchiarola, 511 N.Y.S.2d 125 (App. Div. 1987).
199. Borman v. Gorham-Fayette Bd. of Educ., 502 N.E.2d 1031 (Ohio 1986).

In a complex, multifaceted school desegregation case, it was noted that teachers' contracts were not breached when they were reassigned to various school sites throughout the district; nothing in the contract prevented such reassignments.[200] Nor was the contract of a superintendent breached when he was dismissed, following a hearing, because the contract gave the board the express right to terminate the superintendent on ten days notice.[201] Similarly, those employed "at will" are employed for an indefinite period and can be dismissed at any time.[202]

In contrast to the cases above, a teacher was successful in proving a breach of contract where negotiated seniority rights were disregarded by the board when it placed the teacher on unrequested leave of absence.[203] Exhaustion of administrative remedies is not required where the employer has repudiated the employment contract by failing to convene the grievance committee to consider employee's grievance and by declaring that the employee is not covered by the collective bargaining agreement.[204] Also, where a purported termination was procedurally defective, a probationary teacher's contract was still in force, entitling him to reinstatement, retroactive seniority credit, backpay, and benefits.[205] Three teachers were successful in challenging a school district's use of supplemental contracts which had the effect of denying them job security under the continuing contract statute.[206] And finally, a teacher was declared to be a permanent employee under state statute despite oral and written statements to him that he was only a probationary teacher.[207]

Administrative Regulations and Statutory Provisions

State statutory provisions affecting the employment rights of school employees arose in several cases. Intervening teachers were unsuccessful in challenging a residency requirement where a legislatively ratified home rule charter required city employees hired after a future date to be or become city residents;[208] and the failure to reappoint a teacher

200. United States v. Lawrence County School Dist., 799 F.2d 1031 (5th Cir. 1986). The court also noted that the teachers should be reassigned so that more- and less-experienced teachers were distributed evenly throughout the system.

201. Palmer v. Perry County Bd. of Educ., 498 So. 2d 2 (Ala. 1986).

202. *See e.g.*, DeVico v. Roman Catholic Diocese, 508 N.Y.S.2d 886 (App. Div. 1986).

203. Jenson v. Joint Indep. School Dist. No. 287, 408 N.W.2d 203 (Minn. Ct. App. 1987).

204. Cabarga Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 822 F.2d 188 (1st Cir. 1987).

205. Fraser v. Board of Educ., 516 N.Y.S.2d 44 (App. Div. 1987).

206. Kelso Educ. Ass'n v. Kelso School Dist., 740 P.2d 889 (Wash. Ct. App. 1987).

207. California Teacher's Ass'n v. Governing Bd. of Garvey School Dist., 240 Cal. Rptr. 549 (Ct. App. 1987).

208. Local No. 799, Int'l Ass'n of Firefighters AFL-CIO v. Napolitano, 216 A.2d 1347 (R.I. 1966).

who was over age seventy for the 1983-84 school year was held not a violation of a state human rights act specifically permitting but not mandating annual reappointment after age seventy.[209] A teacher who elected in October to take off the academic year as childbearing leave was not entitled to the ten days of paid annual sick leave since those days accrued on the first of each month.[210] Teachers whose contracts had been cancelled but who had delayed in seeking a remedy were denied the remedy sought.[211] An employee who was recommended for a vacant position, but whose appointment was not affirmed, could not block readvertisement of the position two years later.[212] More successful was a nonrenewed superintendent who won the right to a sabbatical, despite the fact that he would have no duty to return to his position, because he met all the statutory requirements for a mandatory leave.[213] A teacher was successful in winning reinstatement when a part-time position in a school program created through federal funding and consisting entirely of duties formerly performed by the terminated employee was "similar" under state law.[214]

State and local provisions affecting appointment decisions were also seen in a number of cases. Where state law gave teachers seniority in the district priority in filling vacant positions, a court held that the superintendent and board acted arbitrarily in selecting a teacher with no seniority. Evidence showed that the superintendent did not interview the plaintiff nor investigate her qualifications, but rather recommended the appointment of his sister-in-law.[215] On the other hand, where there is no express provision for preferential treatment in hiring and promotion, such a right cannot successfully be claimed.[216] A contract between a superintendent and a school board "for a period of no less than one year" was a one-year contract and not an "open-ended" contract under state law.[217] A final case concerned a city's civil service provisions, which were construed not to require competitive exams for appointment to positions in educational administration.[218]

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209. Duval County School Bd. v. State, 500 So. 2d 158 (Fla. Dist. Ct. App. 1986).
210. Grim v. West Chester Area School Dist., 529 A.2d 71 (Pa. Commw. Ct. 1987).
211. Taylor v. Dothan City Bd. of Educ., 513 So. 2d 623 (Ala. Civ. App. 1987).
212. Purris v. Board of Educ. of City School Dist. of City of N.Y., 512 N.Y.S.2d 874 (App. Div. 1987).
213. United School Dist. v. Rushkin, 525 A.2d 868 (Pa. Commw. Ct. 1987).
214. Anderson v. Board of Coop. Educ. Servs., 512 N.Y.S.2d 870 (App. Div. 1987).
215. Dillon v. Board of Educ., 351 S.E.2d 58 (W. Va. 1986).
216. *See, e.g.*, Meade v. Mingo County Bd. of Educ., 356 S.E.2d 479 (W. Va. 1987) (substitute custodian had no right to preferential appointment to a permanent position).
217. Nordlund v. School Dist. No. 14, 738 P.2d 1299 (Mont. 1987).
218. Board of Educ. v. Bridgeport Educ. Ass'n, 518 A.2d 394 (Conn. App. Ct. 1986).

TENURE

After teachers, and in some cases administrators, successfully have served a probationary period of from two to four or more years, state law awards them "tenure" or a "continuing contract" or the right to be employed "at discretion." The importance of gaining tenure is that it provides for automatic renewal and vastly limits the legitimate reasons for nonrenewal or dismissal, which must be specified in state law. While teachers in some states gain a general tenure, in other states they are tenured in a particular discipline or job. Administrators who are awarded tenure as teachers usually preserve their right to tenure *as a teacher* when they subsequently assume administrative responsibilities, though they may be required to serve another probationary period to gain tenure as an administrator; however, administrators who acquire tenure only as administrators usually do not have the right to later assume a teaching position. Additionally, certain tenure rights often are preserved when employees move from one district within a state to another, but tenure is lost when one moves to a different state.

Tenure Status

That tenure provisions and their application vary dramatically from state to state is illustrated by several cases reported in 1987. In a significant Alabama case, Dr. Oden received tenure as a teacher and later as a principal before being promoted to the position of director of transportation. After he had served over two years in the latter position, the board voted not to reemploy him. An appeals court held that Dr. Oden, having most recently held a support position not requiring "supervisory" work with students and teachers, was not tenured as a supervisor; additionally, he was not tenured as a teacher or principal because he had resigned those positions.[219] On later review, the Alabama Supreme Court held that the term "supervisor" in the tenure law should be construed broadly, in favor of teachers, and that Dr. Oden therefore retained tenure in his transportation position.[220] Similarly, a tenured classroom teacher who served as advisor and assistant director for two years at a magnet school operated as a consortium by three school districts had acquired tenure as advisor and assistant director, both of which were certificated positions, in all three school districts.[221] In another case, a career teacher who subsequently became a probationary principal was held not to have relinquished tenure as a

219. Oden v. Alabama State Tenure Comm'n, 495 So. 2d 664 (Ala. Civ. App. 1985), *rev'd*, 495 So. 2d 664 (Ala. 1986).

220. *Id.*

221. Imbrunone v. Inkster Pub. Schools, 410 N.W.2d 300 (Mich. Ct. App. 1987).

teacher upon assuming the administrative position.[222] And in a case illustrating an unusual effect of achieving tenure in a particular position, a guidance counselor who had obtained tenure in his position, as prescribed by state law, could not lawfully be reassigned to teach reading even though he was certified in reading.[223]

Questions regarding tenure status often arise in situations of attempted lay-off, nonrenewal, or dismissal. A teacher was held to have tenure who had completed two years of teaching with four satisfactory ratings (despite the state's late issuance of certification to which he was entitled);[224] a certified teacher employed for the fourth year as a counselor in a federally funded program met the statutory requirements for "teacher" tenure;[225] and a teacher who had received tenure in another district and had been employed for two years in a new district also achieved tenure.[226] However, a teacher employed for approximately twenty-six days a year for ten years under a "supplemental service contract" did not attain tenure where a tenure statute (as construed with reference to other relevant statutes) required more than 120 days a year.[227] Illustrating the consequences of failing to note tenure eligibility is a case where a court not only awarded tenure to a teacher who had been nonrenewed, but two years backpay and benefits.[228] In another case, a principal notified in the third year of his contract that he would not be renewed was tenured under state law and entitled to reinstatement and back pay.[229]

In an unusual case, an appellate court found "good and sufficient reason" to revoke a continuing contract in favor of an annual contract, where evidence showed that the teacher was unlikely to be able to improve her attendance.[230]

Tenure by Default or Acquiescence

Tenure by default or acquiescence arises when employees who have successfully completed the applicable probationary period are not notified of their nonrenewal in a timely manner or are merely permitted

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222. Rose v. Currituck County Bd. of Educ., 350 S.E.2d 376 (N.C. 1986).
223. Silavent v. Buckeye Cent. Local School Dist. Bd. of Educ., 500 N.E.2d 315 (Ohio Ct. App. 1985).
224. Altoona Area Vocational Technical School v. Pollard, 520 A.2d 99 (Pa. Commw. Ct. 1987).
225. Hillhouse v. Rice School Dist. No. 20, 727 P.2d 843 (Ariz. Ct. App. 1986).
226. Carpenter v. Board of Educ., 514 N.Y.S.2d 264 (App. Div. 1987).
227. Selmeyer v. Southeastern Indiana Vocational School, 509 N.E.2d 1150 (Ind. Ct. App. 1987).
228. Maxfield v. Board of Educ., 525 A.2d 727 (N.J. Super. Ct. App. Div. 1986).
229. Cooper v. Alabama State Tenure Comm'n, 511 So. 2d 209 (Ala. Civ. App. 1987).
230. MacPherson v. School Bd., 505 So. 2d 682 (Fla. Ct. App. 1987).

to teach beyond the probationary period. Several cases in the above section also illustrate how tenure can be gained by default or acquiescence when, because of complex rules for determining tenure, the acquisition of tenure was not verified until nonrenewal was attempted.

CERTIFICATION

The criteria and procedures for certification (sometimes called licensure) of teachers, supervisors, and administrators vary from state to state; the same is true for standards governing re-certification and decertification, revocation, or suspension. Permanent, probationary, or emergency certification is required in all states in order for an employment contract to be legally valid; where there is no valid certification or contract, even the obligation to pay the employee is negated.

Certification Standards

In a situation where the reissuance of a provisional license was denied to an English as a second language teacher who had multiple sclerosis, an appeals court ruled that the state division of human rights had used the wrong standard in overruling the initial decision.[231] Under the state law in effect in the late 1970s, when the case arose, disability protection extended only to conditions that were totally unrelated to the ability to work; subsequent law, which bars discrimination against one who can reasonably (but not necessarily perfectly) perform the job did not apply retrospectively.

Two cases arose where denial of certification was upheld. In one case, refusal of the state board of examiners to accept one and one-half years employment with a state hospital as substitution for a statutory requirement of six months college-supervised internship in the field of clinical psychology was not "irrational, arbitrary, or capricious."[232] In the second case, a teacher who was given one year to complete certification requirements as a middle school mathematics teacher and who was given a one year provisional elementary education certificate was not entitled to reinstatement to a mathematics position when he failed to meet the certification requirements.[233]

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231. New York City Bd. of Educ. v. Division of Human Rights, 515 N.Y.S.2d 543 (App. Div. 1987).

232. Wagschal v. Board of Examiners of Bd. of Educ., 503 N.Y.S.2d 434 (App. Div. 1986).

233. Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).

Decertification, Revocation, or Suspension

In a situation where the revocation of a teacher's license was being considered, because of alleged sexual misconduct with a fifteen-year-old student, an appeals court remanded the case for a determination based on the "preponderance of the evidence" rather than on the higher "clear and convincing evidence" standard.[234] The court also noted that the alleged victim's testimony need not be corroborated for an effective license revocation. Not so lenient was another court's determination in a case involving a male teacher who had pled guilty to a charge of indecent exposure to a child: because the record from the board's (unsuccessful) dismissal hearing was exempted from disclosure under the state's public records law, it could not be used in the board's subsequent action to decertify the teacher.[236] Similarly, procedural protections were afforded a teacher accused of "incompetency, gross insubordination, immorality, and misconduct," because failure to inform him that his license might be permanently rather than temporarily revoked precluded the more severe penalty (even if the evidence justified it).[236] Another case involved a controversy over an agreement a teacher had made to surrender his certificate if he was convicted of pending criminal charges; when the charges were reduced to a misdemeanor, the teacher believed the agreement was no longer valid.[237]

Three cases arose which did not turn on procedural questions. In one case an ROTC instructor whose contract was cancelled when the Army withdrew his authorization to teach ROTC won reinstatement when the Army subsequently reversed its decision.[238] In a second case, a school bus driver who was convicted of DWI and lost her coverage with the school district's insurance carrier could be discharged because certification by the school board to drive a bus depended upon insurance coverage.[239] And finally, the Texas literacy test for teachers was upheld against equal protecton and due process challenges because the test had a rational purpose and decertification after failing the test was not automatic.[240]

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234. Turlington v. Ferris, 496 So. 2d 177 (Fla. Ct. App. 1986).
235. Vander Ayl v. Iowa Professional Teaching Practices Comm'n, 397 N.W.2d 751 (Iowa 1986).
236. Williams v. Turlington, 498 So. 2d 468 (Fla. Ct. App. 1986).
237. Jones v. Turlington, 504 So. 2d 811 (Fla. Ct. App. 1987).
238. Greene County Bd. of Educ. v. Perry, 510 So. 2d 257 (Ala. Civ. App. 1987).
239. Mayes v. Board of Review, Ohio Bureau of Employment Servs., 513 N.E.2d 818 (Ohio Ct. App. 1986).
240. State v. Project Principle, Inc., 724 S.W.2d 387 (Tex. 1978).

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BARGAINING

Perry A. Zirkel and Margaret D. Smith

Introduction / 38
Constitutional Issues / 39
Recognition and Representation Issues / 40
  Unit Determination / 40
    Supervisory, Managerial, and Confidential Employees / 40
    Other Representation and Recognition Issues / 41
Rights and Obligations of Exclusive Bargaining Representatives / 42
  Union Rights / 42
  Obligations of Exclusive Representatives / 42
Scope of Bargaining / 45
  Mandatory Topics of Bargaining / 45
  Permissive Topics of Bargaining / 46
  Prohibited Topics of Bargaining / 46
Grievability and Arbitrability /47
  Presumption and Arbitrability /47
  Who Determines? / 48
  Procedural Issues /49
  Management Prerogatives as a Bar /50
Judicial Review /51
  Arbitration Awards and Employment Relations Board Rulings / 51
    Standard of Review / 51
  Propriety of Arbitral Awards and Agency Decisions / 53
  Statute-based Claims / 57
    Interpretation of Collective Bargaining Legislation / 57
  Interrelationship with Other Laws / 58
  Rights on Expiration of Contracts / 62
Concerted Activity / 63
Miscellaneous Decisions / 64
Conclusion / 65

INTRODUCTION

An increased amount of case law dealing with collective bargaining in education was evident in 1987; this year's caseload was the largest to

date. Apparently, educational employers and their unionized employees are increasingly resorting to the courts rather than resolving issues at the negotiation or arbitration table. However, there were no United States Supreme Court decisions dealing with collective bargaining in education this year. Nor were there any surprises in terms of doctrinal development. Across the country the courts applied legal principles long recognized in the field of labor relations.

CONSTITUTIONAL ISSUES

In 1987 state and federal constitutional issues arose in several cases related to collective bargaining. A state constitutional issue was presented in Florida when a teachers' union challenged an annual reward of $3,000 provided under a statewide master teacher program, claiming that the payment abridged its collective bargaining rights guaranteed under the Florida Constitution. The Supreme Court of Florida held that the $3,000 was not a "wage" subject to bargaining and, therefore, that the master teacher program did not infringe upon the union's state constitutional collective bargaining rights.[1]

Alleging violation of both the federal and state constitutions, a teacher in Michigan brought an action against the school district and her union, claiming, in addition to state statutory violations, a denial of due process. Specifically, she argued that she had a constitutionally protected right in her previously accrued seniority that could not be taken away, under a new collective bargaining agreement provision that only gave her partial seniority credit for her maternity leaves, without due process under the Michigan and federal Constitutions. Finding that she had merely a unilateral expectation, rather than a legitimate entitlement, that her previously accrued seniority would remain untouched by the new collective bargaining agreement, the court ruled that she had no constitutionally protected property right under the expired agreement.[2] Key to the court's conclusion was the rule, under Michigan precedents, that a bargaining representative may in negotiations with the employer modify or abrogate seniority rights accrued by the members of the previous collective contracts.

The constitutionality of agency shop fees continued, in 1987, to be a subject of litigation. In one case, the Second Circuit Court of Appeals upheld the constitutionality of fee-collection procedures that utilized

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1. United Teachers of Dade v. Dade County School Bd., 500 So. 2d 508 (Fla. 1986).
2. Carlson v. North Dearborn Heights Bd. of Educ., 403 N.W.2d 598 (Mich. Ct. App. 1987). The teacher also alleged sex discrimination and breach of duty of fair representation, both under state statutes.

the American Arbitration Association to arbitrate nonmember fee disputes[3] finding the Connecticut Education Association in compliance with the guidelines set forth under the Supreme Court's 1986 decision in *Chicago Teachers Union v. Hudson.*[4]

In two other such cases, the courts declined to decide the constitutional claims. In the first case, the federal district court refused to issue a preliminary injunction sought by nonunion teachers who alleged federal and state constitutional violations, including violation of their rights of expression and association, due process, and equal protection, regarding their "fair share" portion of collective bargaining costs.[5] The district court declined to determine the constitutional issues on the grounds of *Pullman*-type abstention, because the concurrent proceeding pending before the Wisconsin Employment Relations Commission would likely resolve the matter based on state legislation.

In the second such case, the union successfully sued in state court to collect fair-share representation fees from nonunion teachers. The teachers then brought a suit in federal court challenging the constitutionality of the collective bargaining provision that provided for the fair-share fees. The federal court abstained from exercising its jurisdiction, concluding that the state court action, from which there already had been a judgment, could adequately have protected the teachers' federal constitutional rights and that the federal suit might merely have been a method to collaterally attack the final state court judgment.[6]

Recognition and Representation Issues

Unit Determination

Supervisory, Managerial, and Confidential Employees. Only three cases in 1987 dealt with the status of supervisory, managerial, or confidential employees. In a New Hampshire case, principals had voted to be represented by the same union as the teachers whom they supervised. The state supreme court held that under state statute such representation was prohibited in light of potential conflicts of interest, but that the principals were free to choose any other bargaining representative.[7] Somewhat similarly, supervisors in Los Angeles sought to form a bargaining unit that was affiliated with the same international union as was the unit for the employees whom they supervised. Finding

3. Andrews v. Education Ass'n of Cheshire, 653 F. Supp. 1373 (D. Conn. 1987).
4. 444 U.S. 1066 (1986).
5. Jordi v. Sauk Prairie School Bd., 651 F. Supp. 1566 (W.D. Wis. 1987). For another case in which a constitutional issue arose, see *infra* note 129 and accompanying text.
6. Oliver v. Fort Wayne Educ. Ass'n, 820 F.2d 913 (7th Cir. 1987).
7. *In re* Manchester Bd. of School Comm., 523 A.2d 114 (N.H 1987).

that, because of their affiliation with the same international union, the two units would really be members of the same employee organization, the court ruled that the supervisors' unit was not appropriate.[8]

In contrast, the third case dealt with faculty members in higher education. The National Labor Relations Board had certified the American Association of University Professors as the bargaining representative of the faculty at Boston University. After bargaining requests were rejected by the University, the Association filed unfair labor charges. Ruling that its "judicial hands are tied by *Yeshiva*,"[9] the First Circuit Court of Appeals held that these full-time faculty members were managerial employees. Inasmuch as the faculty members were thereby excluded from coverage of the National Labor Relations Act, the unfair labor practice charges in the case were dismissed.[10]

Other Representation and Recognition Issues. A few cases in 1987 dealt with assorted other representation and recognition issues. In a school district in Iowa, a group of nonprofessional employees sought to join a bargaining unit previously composed entirely of professional employees, including teachers and counselors.[11] The Supreme Court of Iowa affirmed the decision of the state's Public Employment Relations Board that there was a sufficient "community of interest" between the professional and nonprofessional employees to support including both in one bargaining unit.

Similarly, Pennsylvania's intermediate appellate court upheld the inclusion of licensed practical nurse instructors in a previously certified professional bargaining unit of teachers, finding the requisite shared "community of interest" between the groups.[12]

In contrast, Minnesota's intermediate appellate court ruled that master's degree students who taught in a school district as "teaching fellows" for one year as part of their degree programs were not public employees and, therefore, were not eligible to be included in the school district teachers' bargaining unit.[13]

The two other representation cases were decided in Indiana. In one case the representation issue arose directly. An educational association sought to represent teachers in three separate school corporations. The

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8. Los Angeles Unified School Dist. v. Public Employment Relations Bd., 237 Cal. Rptr. 278 (Ct. App. 1986).

9. National Labor Relations Bd. v. Yeshiva Univ., 444 U.S. 672 (1980).

10. Boston Univ. Chapter, Am. Ass'n of Univ. Professors v. National Labor Relations Bd., 835 F.2d 399 (1st Cir. 1987).

11. Anthon-Oto Community School Dist. v. PERB, 404 N.W.2d 140 (Iowa 1987).

12. Chester Upland School Dist. v. Pennsylvania Labor Relations Bd., 532 A.2d 925 (Pa. Commw. Ct. 1987).

13. Rochester Educ. Ass'n v. Independent School Dist., 415 N.W.2d 743 (Minn. Ct. App. 1987).

Indiana Education Employment Relations Board interpreted the state's teacher-board collective bargaining act to prohibit a teachers' organization from doing so, but the intermediate court of appeals reversed, finding no language in the statute that limited a teachers' union to a single school corporation for its membership.[14]

In the other Indiana case, representation arose as an indirect issue secondary to, but determinative of, grievability. A school district in Indiana contracted with a public special education cooperative, or intermediate unit, to provide the district with special education teachers. These teachers then sought additional pay through the grievance procedure established between the school district and its teachers' union. The state court of appeals ruled that the school district was not required to proceed with the grievance, because the special education teachers belonged to the bargaining unit of the special education cooperative, and, therefore, were not represented by the school employee organization with whom the school district was obligated to bargain.[15]

RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

Union Rights

Agency shop cases are covered in the "Constitutional Issues" section above; the only other union rights case concerned dues deduction. This case arose in Illinois when a successor union sued a school district for failing to remit dues to the new union in compliance with a check-off arrangement authorized by state statute. The board had been confused as to whom and where to send the dues and had advised union members to forward dues to the union of their choice for a short period of time. Subsequently, the board honored the dues check-off privilege to the successor union. Illinois' intermediate appellate court held that the district's temporary refusal to remit dues to the successor union under those circumstances was not improper.[16]

Obligations of Exclusive Representatives

Unions not only have certain rights as the exclusive bargaining

14. DeKalb County Eastern Community School Dist. v. DeKalb County Eastern Educ. Ass'n, 513 N.E.2d 189 (Ind. Ct. App. 1987).

15. Northwest Indiana Educ. Ass'n v. School City of Hobart, 503 N.W.2d 920 (Ind. Ct. App. 1987).

16. Local 253, Div. Affiliated with Local 50 v. Illinois Educ. Labor Relations Bd., 512 N.E.2d 1008 (Ill. App. Ct. 1987).

agent; they also have certain obligations. The primary obligation, from a litigation perspective, is the duty of fair representation (DFR).

In three 1987 cases school employees were unsuccessful in their DFR suits against their respective unions. In the first such case a principal, representing herself in a *pro se* action, claimed that the union had failed to provide her with legal representation during her termination proceeding. The court ruled against her, finding that neither the list of benefits given to the principal when the union solicited her membership, nor a limited oral agreement between the principal and her union, imposed a duty on the union to provide the principal with complete legal representation.[17] In the second case a teacher was also unsuccessful in her claim that the union failed to fairly represent her. The court noted that to substantiate her claim the teacher would have to demonstrate bad faith, arbitrariness, or discrimination on the part of the union. The court found that the union's decision not to further pursue the teacher's claim was based on an assessment of the merits of the claim, not on an improper disregard of the teachers' rights.[18] In the third case, again a *pro se* action, a New York appellate court upheld a lower court's dismissal of the teacher's claims against her union, finding that the union's conduct was not arbitrary, capricious, discriminatory, or in bad faith.[19] The union staff had met with the teacher in an attempt to resolve issues concerning her initial claims and had even arranged for representation by an outside attorney prior to concluding that her claims were not meritorious.

Conversely, in a fourth case a teacher was partially successful in her DFR claim against a union, insofar as the appellate court reversed a lower court's summary judgment against her.[20] Although the teacher in question was not a member of the union, the union was still required to represent all employees in the unit. The court ruled that her claim was at least arguably meritorious; the issue of whether the representative breached its duty of fair representation by refusing in bad faith to pursue her grievance was a question of fact, precluding summary judgment.

Two other cases involved the statute of limitations applicable in DFR suits. A Michigan appellate court held that a teacher's DFR claim against the union was barred by a six-month statute of limitations under the state's Public Employment Relations Act.[21] In contrast, in two New

17. McCutcheon v. Chicago Principals Ass'n, 513 N.E.2d 55 (Ill. App. Ct. 1987).
18. Margolin v. Newman, 520 N.Y.S.2d 226 (App. Div. 1987).
19. Clissuras v. City of New York, 517 N.Y.S.2d 39 (App. Div. 1987).
20. Zimmerman v. Foundation of the French Int'l School, 830 F.2d 1316 (4th Cir. 1987).
21. Carlson v. North Dearborn Heights Board of Educ., 403 N.W.2d 598 (Mich. Ct. App. 1987). For another issue in this case, see *supra* text accompanying note 2.

York cases the courts applied a six-year general statute of limitations for breach of contract actions rather than a ninety-day limit for proceedings to vacate an arbitration award or a four-month period established by the PERB for filing unfair labor claims.[22] In the second of the New York cases the court also ruled that the employee's resignation from her job did not absolve the union of its duty to fairly represent her.[23]

Other DFR suits were disposed of on jurisdictional grounds. In a Michigan case, the defendant-union bargained away a grandfather clause, which had exempted plaintiff-teachers from paying the agency-shop fee. When the plaintiffs successively filed an unfair labor practice charge with the Michigan Employment Relations Commission and a DFR suit in the state trial court, the appellate court ruled that the trial court should dismiss the suit because the charge before the Commission involved the same claim and parties.[24]

In the Pennsylvania case a teacher brought an action against her union for failing to represent her during negotiations with her employer. Pennsylvania's intermediate appellate court dismissed the suit, concluding that the allegations concerned an unfair labor practice and, as such, fell within the exclusive jurisdiction of the state labor relations board.[25]

In an unusual case, members of a union in New York brought an action to require the union's newspaper to publish a paid advertisement that responded to the actions of Albert Shanker, the president of the American Federation of Teachers (AFT). Mr. Shanker had signed an advertisement in the *New York Times* which urged support of the contras in Nicaragua and which identified him as the president of AFT. The union newspaper rejected plaintiffs' attempted ad, which took the opposing viewpoint to Shanker's, based on its policy of not accepting political advertisements. Plaintiffs predicated their right to relief on a provision of the federal Labor-Management Reporting and Disclosure Act that provides for freedom of speech of union members. The federal district court dismissed the suit, ruling that the plaintiffs had failed to allege any interference with speech protected by the statute and that, even if one were to assume arguendo that the Shanker ad expressed political views attributable to the union, the union's policy was reasonably based on its need to avoid internal division and was fairly applied by offering to publish plaintiffs' ad free as a letter to the editor.[26]

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22. Hoerger v. Board of Educ., 514 N.Y.S.2d 395 (App. Div. 1987); Baker v. Board of West Irondequoit Cent. School Dist., 520 N.Y.S.2d 538 (App. Div. 1987).
23. 520 N.Y.S.2d at 543.
24. Cosgrove v. Lansing Bd. of Educ., 416 N.W.2d 316 (Mich. Ct. App. 1987).
25. Segilia v. Riverside School Serv. Personnel Ass'n, 526 A.2d 832 (Pa. Commw. Ct. 1987).
26. Roman v. New York State United Teachers, 655 F. Supp. 422 (S.D.N.Y. 1987).

SCOPE OF BARGAINING

Mandatory Topics of Bargaining

Several cases dealt with whether various issues fell within the mandatory scope of collective bargaining. Two of them reflected opposite conclusions with regard to the subject of teacher evaluation. Iowa's supreme court held that under the applicable state statute not only grievances but also evaluation procedures constituted mandatory subjects of bargaining.[27] The court ruled that the union's remediation proposal, which required the district to identify teacher problems and offer suggestions for improvement, was part of the evaluation procedures and, therefore, was a mandatory subject except for the part that required the building principal to perform the evaluations, which the parties agreed at oral argument was a permissive subject. Conversely, Connecticut's highest court reached the opposite result, interpreting the state's Teacher Evaluation Act, which authorizes the addition of "other guidelines as may be established by mutual agreement between the . . . board of education and the teachers' [organization]," as intending evaluation to be a permissive, not mandatory, subject of bargaining.[28]

Two Michigan cases added to the list of mandatory topics of bargaining in that state. The intermediate appeals court held that both subcontracting special education services to an intermediate school district[29] and increasing the number of assigned daily class periods for high school teachers[30] were mandatory bargaining topics. The former case is currently on appeal.

In other cases, however, the same Michigan court ruled that two other issues were not mandatory subjects of collective bargaining. In the first case, the reorganization decision to eliminate teaching positions and assign those duties to a new community school director was determined to be within the scope of management prerogatives and, therefore, to not be a mandatory subject of bargaining.[31] Likewise, budgetary layoffs at a community college were determined to be within the managerial rights of the college.[32] While the impact of those layoffs on

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27. Northeast Community School Dist. v. Public Employment Relations Bd., 408 N.W.2d 46 (Iowa 1987).

28. Wethersfield Bd. of Educ. v. Connecticut Bd. of Labor Relations, 519 A.2d 41 (Conn. 1986).

29. Bay City Educ. Ass'n v. Bay City Pub. Schools, 397 N.W.2d 219 (Mich. Ct. App. 1986), *appeal granted*, 402 N.W.2d 468 (Mich. 1987).

30. Kent County Educ. Ass'n v. Cedar Springs Pub. Schools, 403 N.W.2d 494 (Mich. Ct. App. 1987).

31. United Teachers of Flint v. Flint School Dist., 404 N.W.2d 637 (Mich. Ct. App. 1986).

32. Schoolcraft College Ass'n of Office Personnel v. Schoolcraft Community College, 401 N.W.2d 915 (Mich. Ct. App. 1986).

the remaining employees would be a mandatory subject of bargaining, in this case the court found the impact to be *de minimus*.

Permissive Topics of Bargaining

In addition to the aforementioned Connecticut case concerning teacher evaluation, only two cases focused on permissive topics of bargaining. In Minnesota an industrial arts teacher was placed on unrequested leave of absence as the school district's response to declining enrollments and curriculum changes. The appellate court held that while Minnesota statutes only required a license for a teacher to be certified, it was permissible for the parties to have negotiated additional requirements as to teacher qualifications.[33] Since the teacher did not have the additional qualifications for other positions that were included in the collective bargaining agreement, he had been properly placed on unrequested leave.

In New York a school district attempted to stay the arbitration of a grievance that challenged its termination of a school bus driver. The district alleged that its power to terminate employees was nondelegable. The court held that although the school district could have retained this power, it may voluntarily bargain and agree to procedures and programs governing the exercise of that power.[34]

Prohibited Topics of Bargaining

In addition to the aforementioned Michigan decisions, courts identified some other prohibited subjects of collective bargaining in 1987 cases. In Maryland the state court of appeals held that matters of educational policy, the school calendar, and job classification were not subject to collective bargaining.[35]

In a specialized case applicable to the Department of Defense Dependents Schools (DoDDS), the D.C. Circuit Court held that the following topics were nonnegotiable under the Federal Service Labor-Management Act: a proposal that would provide benefits to DoDDS employees released from duty without pay to represent the recognized union; a proposal that would prohibit the use of any record not accessible to the employee from being used adversely against the employee; a proposal that would prevent DoDDS from delegating the supervision of the employees to the personnel of the host military departments;

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33. *In re* Nelson, 416 N.W.2d 848 (Minn. Ct. App. 1987).

34. Sweet Home Cent. School Dist. v. Sweet Home Serv. Employees Ass'n, 522 N.Y.S.2d 58 (App. Div. 1987).

35. Montgomery County Educ. Ass'n v. Board of Educ., 534 A.2d 980 (Md. Ct. App. 1987).

proposals that would require DoDDS to give union representatives, who are not DoDDS employees, documents requesting use of military facilities and services overseas, reimburseable government travel orders, and access to DoD services and facilities outside the U.S.; and a proposal to provide DoDDS employees with on-site telephones for their use.[36]

GRIEVABILITY AND ARBITRABILITY

Presumption and Arbitrability

Although there is a general judicial presumption favoring arbitrability, the five cases in 1987 were exceptions or contradictions to the rule. In New York a union sought arbitration of an alleged violation of a community college's procedure for reviewing allegations of sexual harassment and discrimination. The appellate court upheld the lower court ruling that the claim was not subject to arbitration, because said procedure was not incorporated or made part of the collective bargaining agreement.[37] Interestingly, the court put the burden on the union to show a valid and specific agreement evidencing a mutual intent to bargain such claims, thus apparently reversing or at least reducing the general pro-arbitrability presumption.[38]

More clearly following the contractual scope criterion, a California appellate court vacated an arbitration award based on a finding that the collective bargaining agreement did not address the subject issue of reduction in hours and wages or that of improper terminations.[39] Without such coverage, the arbitrator was without power to award a teacher the relief she sought.

Fitting in the same pattern was a Michigan case in which a teacher had made statements to the president of the board of education regarding possible illegal activities of certain school employees. After making those statements the teacher had been suspended and threatened with discharge. The teacher then sought injunctive relief and damages through the courts, claiming that his activities were protected by the state's Whistleblowers' Protection Act. The trial court granted summary judgment to the employer because the teacher had not exhausted the grievance remedies provided in the collective bargaining agreement. The state court of appeals reversed, finding that the employer had no

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36. Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 827 F.2d 814 (D.C. Cir. 1987).

37. County of Rockland v. Rockland County Unit of Rockland Community College Fed'n of Teachers, 509 N.Y.S.2d 608 (App. Div. 1986).

38. For a New York case illustrating the contrasting issue of procedural arbitrability, see *infra* note 51.

39. Marshall v. Russo, 242 Cal. Rptr. 657 (Ct. App. 1987).

right to arbitrate that particular dispute, because the issue was not one that arose under the terms of the collective bargaining contract.[40]

Other exceptions to the presumption were illustrated by cases in New York and Minnesota. In the New York case, the court upheld a stay of arbitration involving a teacher who had failed to receive certification, because the matter had already been resolved by litigation.[41] In the Minnesota case, the appellate court upheld the nonarbitrability of a former bus driver's grievance, because the bus driver was an at-will employee and not a member of the bus drivers' association.[42] Inasmuch as he was not a party to the contract between the school district and the association, his grievance was nonarbitrable.

Who Determines?

In the category of "Who Determines" the arbitrability issue, there are three separate possibilities as to the proper choice of a forum: the arbitrator, the public employment relations board, or the court. The first option was illustrated by two cases. In an Ohio case a board of education sought to intercede in the courts in a matter proceeding through arbitration. The court held that it did not have jurisdiction in the matter; once the arbitration procedure had been invoked the arbitrator had exclusive jurisdiction over the subject matter.[43] Only after the arbitration process was complete, the court clarified, could it become involved in a matter that was subject to arbitration. Somewhat similarly, in the New York case, the appellate court ruled that the grievance procedure provided in a collective bargaining agreement between a university and adjunct faculty members was the exclusive remedy available to the teacher.[44]

Two Illinois cases illustrated the third option. In one of these cases, the appellate court upheld a trial court's injunction preventing both an arbitrator and the Illinois Educational Relations Board from determining arbitrability, holding that the state's circuit court retained jurisdiction to decide arbitrability of disputes under collective bargaining.[45] In the other case, the same appellate court adhered to the rule that while they may not weigh the merits of a dispute, the courts generally will initially

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40. Tuttle v. Bloomfield Hills School Dist., 402 N.W.2d 54 (Mich. Ct. App. 1986).

41. Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).

42. Envall v. Independent School Dist. No. 704, 399 N.W.2d 593 (Minn. Ct. App. 1987). For other nonarbitrability rulings, see the "Management Prerogatives" section *infra*.

43. Pike-Delta-York Bd. of Educ. v. Pike-Delta-York Educ. Ass'n, 508 N.E.2d 678 (Ohio C.P. 1987).

44. Post-Adjunct Faculty Ass'n v. Board of Trustees, 511 N.Y.S.2d 874 (App. Div. 1987).

45. Board of Educ. v. Warren Township High School Fed'n of Teachers, 515 N.E.2d 131 (Ill. App. Ct. 1987).

determine substantive arbitrability of grievances except when parties mutually agree to allow the arbitrator to make that initial determination.[46]

Procedural Issues

The types of procedural issues that the courts addressed in 1987 varied. Several cases illustrate that the exhaustion doctrine may be seen as a procedural problem of sequencing. In Pennsylvania the court refused to consider a teacher's challenge to the district's computation of her seniority rights and its failure to consider her for a vacant position, because the teacher had failed to file a grievance as required by the collective bargaining contract.[47] Similarly, a court in Washington barred a guidance counselor's judicial action because he had failed to exhaust the available grievance arbitration procedure.[48]

The partially and completely converse sides of the exhaustion issue were revealed by cases in Kentucky and Ohio, respectively. In the Kentucky case, an assistant professor sought an injunction against his dismissal until the completion of the processing of his pending grievance. The appellate court ruled that his request for injunction was moot because by the time of his appeal he had completed the grievance procedure.[49] In the Ohio case, the state's highest court held that because there was no dispute as to the provisions of the collective bargaining agreement, its grievance arbitration procedures need not be exhausted; rather the plaintiff-teachers could proceed with claims in court based on alleged breach of their individual contracts.[50]

A New York case illustrated the issue of procedural arbitrability. In this case the school district argued that arbitration should be stayed because the union had failed to abide by the collective bargaining contract requirement that a grievance be submitted in writing and an attempt made to resolve it informally before going to arbitration. The appellate court ruled that matters concerning the step-by-step grievance process were matters of procedural arbitrability which should be resolved by an arbitrator.[51]

The procedural requirements of state labor boards were exemplified by a Michigan case, in which the state's supreme court reversed the decision of the Michigan Employment Relations Commission to dismiss

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46. Board of Educ. v. Rockford Educ. Ass'n, 501 N.E.2d 338 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 725 (Ill. 1987).
47. Clapsaddle v. Bethel Park School Dist., 520 A.2d 537 (Pa. Commw. Ct. 1987).
48. Lew v. Seattle School Dist. No. 1, 736 P.2d 690 (Wash. Ct. App. 1987).
49. Ashley v. University of Louisville, 723 S.W.2d 866 (Ky. Ct. App. 1987).
50. Tapo v. Columbus Bd. of Educ., 509 N.E.2d 419 (Ohio 1987).
51. Enlarged City School Dist. v. Troy Teachers' Ass'n, 516 N.Y.S.2d 195 (N.Y. 1987).

the teachers' claim. The court held that while the Commission had the procedural authority to dismiss the claims, the parties must first be afforded an opportunity to present oral arguments on the sufficiency of their claims.[52]

In the concluding case in this section New York's highest court was faced with determining whether a teacher had the right, under the contractual grievance procedure, to proceed to arbitration without the union's concurrence.[53] The court held that the employee could not individually resort to arbitration, because the union, as the party to the contract, controlled the decision as to whether to arbitrate. The only recourse for the employee would be to bring a DFR suit, a topic covered above under the "Obligations of Exclusive Representatives" section.

Management Prerogatives as a Bar

Certain topics are barred from negotiation or arbitration because they lie within the exclusive discretion of management. Three Illinois cases are illustrative. In the first Illinois case the discretionary appointment of teachers was determined to be a power exclusively vested in the school board and, therefore, nondelegable and nonarbitrable through collective bargaining.[54] In the second case the decision to rehire or dismiss a nontenured teacher was determined to be nonarbitrable because it was a nondelegable power of the community college board.[55] In the third Illinois example the appellate court held that the determination and evaluation of individual teacher qualifications and of seniority were exempt from arbitration because they required the school board's educational expertise and could not be delegated.[56]

Similarly, continuing its management-bar tradition, a New York appellate court vacated an arbitrator's award which interfered with the school district's nondelegable responsibility to determine the qualifications for each position and which teachers best met those qualifications.[57]

On the other hand, the Washington Supreme Court upheld an arbitrator's decision that transferred two teachers from part-time to

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52. Smith v. Lansing School Dist., 406 N.W.2d 825 (Mich. 1987).

53. Board of Educ. v. Ambach, 522 N.Y.S.2d 831 (N.Y. 1987).

54. Board of Educ. v. Rockford Educ. Ass'n, 501 N.E.2d 338 (Ill. App. Ct. 1986). See *supra* text accompanying note 46 for a discussion of another issue in this case.

55. Board of Trustees v. Federation of College Clerical and Technical Personnel, 505 N.E.2d 1264 (Ill. App. Ct. 1987), *appeal denied*, 511 N.E.2d 425 (Ill. 1987).

56. Proviso Council of West Suburban Teachers' Union v. Board of Educ., 513 N.E.2d 996 (Ill. App. Ct. 1987).

57. Three Village Teachers' Ass'n v. Three Village Cent. School Dist., 512 N.Y.S.2d 878 (App. Div. 1987), *appeal denied*, 521 N.Y.S.2d 224 (N.Y. 1987).

full-time positions, ruling that the provision that permitted such a transfer was valid and did not constitute an unlawful delegation of the school board's authority.[58]

JUDICIAL REVIEW

Arbitration Awards and Employment Relations Board Rulings

Standard of Review. Arbitrators' decisions are generally accorded judicial deference; the award is typically upheld by the courts as long as it draws its essence from the collective bargaining agreement.[59] This deference extends to the arbitrator's remedy. For example, in a Pennsylvania case former teachers at a state facility for the mentally retarded sought enforcement of a 1984 arbitrator's decision that ordered backpay for fifty-six furloughed employees. The court subsequently affirmed that order in 1985, but the employer later created a subclass of four employees whose work facility had been closed in 1981, refusing to pay them backpay extending earlier than the 1981 closing. The court found that the attempt to create a subclass after arbitration came as an afterthought and ruled that the employer had waived the issue by not previously raising it. Thus, the arbitrator's remedial order was upheld in its entirety.[60]

However, judicial deference to arbitrators' awards does not extend to questions of external law. For example, Pennsylvania's intermediate appellate court held that an arbitrator exceeded his authority in ordering realignment of school personnel in response to teachers' grievance, because his award, which was otherwise entitled to great deference, was not in accord with well established case law.[61] As another example, Maryland's highest court vacated an arbitrator's award, finding it to be based on a palpable mistake of law.[62]

Similarly, a New Jersey appellate court ruled that while an arbitrator's award is entitled to a presumption of validity, in this case the arbitrator's decision exceeded the scope of his power because it was based on a mistake of law.[63]

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58. Lake Washington School Dist. No. 414 v. Lake Washington Educ. Ass'n, 745 P.2d 504 (Wash. 1987).

59. For several examples, see the "Propriety of Arbitral Awards" section *infra*.

60. Commonwealth v. State Schools & Hospital Fed'n of Teachers, 535 A.2d 220 (Pa. Commw. Ct. 1987). For less successful arbitrators' remedies, see the "Propriety of Arbitral Awards" section *infra*.

61. Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 521 A.2d 965 (Pa. Commw. Ct. 1985).

62. Board of Educ. v. Prince George's County Educators Ass'n, 522 A.2d 931 (Md. 1987).

63. Jersey City Educ. Ass'n, Inc. v. Board of Educ., 527 A.2d 84 (N.J. Super. Ct. App. Div. 1987).

Another constraint related to external law is public policy. For example, a Michigan appellate court upheld an arbitrator's decision, disagreeing with the trial court's ruling that the public policy against the use of narcotics justified vacating an arbitrator's award that returned an associate professor to his position after he allegedly had smoked marijuana with his students.[64] The appeals court determined that the arbitrator's award was not contrary to public policy; thus, the award stood.

Other 1987 cases concerned the review of labor board decisions. The first such case in this category concerns the review of a labor board decision that in turn reviewed an arbitration board's award. In this case New Hampshire's highest court ruled that the state's labor relations board committed error of law by applying principles of nonreviewability to the arbitrators' award and by upholding the arbitrators' misallocation of the burden of proof.[65]

In a second case in this category, the Washington Supreme Court clarified the dual review standard applicable to cases presenting mixed questions of fact and law under that state's unfair labor practice statute: the factual component is reviewed under the "clearly erroneous" standard, and the legal component is reviewed under the "error of law" standard. Under this dual standard, the court upheld the higher education labor board's various orders in this case, except the one relating to the union's request for attorney's fees on appeal.[66]

In a third case in this category, South Dakota's supreme court ruled that in unfair labor practice cases the trial court should not pass upon issues of fact and conclusions of law that had not first been decided by the state department of labor, unless there was a statute to the contrary.[67] The court remanded the case to the deputy director of the department of labor to determine if an unfair labor practice had been committed and if the teachers were entitled to additional compensation for extra work.

In another case involving the decision of a labor board, an Illinois appellate court upheld the decision of the Illinois Educational Labor Relations Board that a school district had not committed an unfair labor practice in hiring an independent contractor to perform custodial work, finding the decision to meet the standard of being "not contrary to the manifest weight of the evidence."[68]

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64. Lansing Community College v. Lansing Community College Chapter, Michigan Ass'n for Higher Educ., 409 N.W.2d 823 (Mich. Ct. App. 1987).

65. *In re* Board of Trustees of Univ. Sys., 531 A.2d 315 (N.H. 1987).

66. Green River Community College v. Higher Educ. Personnel Bd., 730 P.2d 653 (Wash. 1987).

67. Meade Educ. Ass'n v. Meade School Dist., 399 N.W.2d 885 (S.D. 1987).

68. Service Employees Int'l Local Union No. 316 v. Illinois Labor Relations Bd., 505 N.E.2d 418 (Ill. App. Ct. 1987).

The final case of this section concerned the review sought by teachers in Rhode Island of a state commissioner of education's decision that had also been confirmed by the state board of regents, reinstating the teachers with full back pay minus the amount of unemployment compensation that they received. The state's supreme court upheld the deduction, because it appropriately avoided giving the teachers a "double recovery."[69] Using a review standard borrowed from the arbitral arena, the court concluded that the commissioner committed no error of law.

Propriety of Arbitral Awards and Agency Decisions

Overlapping with the preceding "Standard of Review" section, many court decisions were rendered in 1987 which dealt with the propriety of arbitration and administrative agency decisions. In the majority of the cases the arbitral awards were upheld. The Pennsylvania cases illustrated the application of the traditional deferential standard whereby the arbitrators' awards are upheld if they are found to be drawn from the "essence" of the collective bargaining agreement. One such example involved an arbitrator's inclusion of full-time long-term substitute teachers in the teacher bargaining unit.[70] Another involved an arbitrator's decision to reverse the discharge of a custodian based on his finding that the custodian had never misrepresented his medical condition.[71] In both instances the court found that the arbitrators' decisions were rationally derived from the "essence" of the collective bargaining agreement.

In a Massachusetts case reminiscent of the aforementioned "Management Prerogatives" section, an arbitrator had ordered a teacher reinstated. The school district argued that the arbitrator exceeded his authority, but the court affirmed the arbitrator's award, finding that he had carefully restricted his decision to procedural violations of the evaluation process rather than substantively reviewing the teacher's right to continued employment.[72]

In another termination case, an arbitrator had ruled against the teacher, finding that she had failed to perform satisfactorily and that her removal was proper. The court upheld the arbitrator's award under the federal statute applicable to Department of Defense Dependent

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69. Zuromski v. Providence School Comm., 520 A.2d 137 (R.I. 1987).

70. West Shore School Dist. v. West Shore Educ. Ass'n, 519 A.2d 552 (Pa. Commw. Ct. 1986).

71. Minersville Area School Dist. v. Minersville Area School Serv. Personnel Ass'n, 518 A.2d 874 (Pa. Commw. Ct. 1986), *appeal denied*, 533 A.2d 715 (Pa. 1987).

72. School Comm. v. Norton Teachers' Ass'n, 505 N.E.2d 531 (Mass. Ct. App. 1987), *review denied*, 507 N.E.2d 1056 (Mass. 1987).

Schools, finding the award to be neither arbitrary, capricious, nor contrary to the law.[73]

In three New York cases, arbitrators' awards were also upheld. In the first of these cases an arbitrator had ordered the reinstatement of two tenured teachers who had been disciplined for allegedly using excessive force on students. The court held that the arbitrator had properly denied a motion to reopen the proceeding for the introduction of new evidence, because the school district had already received and declined the opportunity to introduce the evidence earlier.[74] In the second case the court affirmed an arbitrator's award adverse to the grievant-teacher, finding that the decision was not irrational, did not violate public policy, and did not exceed a specifically enumerated limitation on the arbitrator's power.[75] In the final New York case affirming an arbitrator's award, a teacher argued that the arbitrator committed a procedural error in taking too long to reach his decision. The court disagreed, because not only had the parties consented to the extension, but the teacher had also failed to make timely objection to the delay.[76]

In other cases, however, arbitrators' awards were overturned. In one such case the Wisconsin Supreme Court vacated an arbitrator's award because the arbitrator failed to inform the school district that he had previously worked for the teachers' union.[77] The court held that such disclosure was required and that failure to do so constituted evident partiality. Other judicially vacated awards are identified in the preceding "Standard of Review" section.

Other cases represented limitations on arbitrators' remedies. In one such case, a New York appellate court remitted a case back to an arbitrator to modify his award which had ordered a school board to cease combined grade classes.[78] The court noted that only procedural prerequisites for changes relating to salaries and conditions of employment were contractually arbitrable; thus, the arbitrator could compel the parties to consult and negotiate on those matters, but he could not order the school district to discontinue the combined grade classes.

Another appellate court made a similar decision in a Massachusetts case. The arbitrator had ordered teachers reinstated to former positions.

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73. Rogers v. Department of Defense Dependents Schools, 814 F.2d 1549 (Fed. Cir. 1987).

74. Susquehanna Valley Teachers Ass'n v. Board of Educ., 511 N.Y.S.2d 164 (App. Div. 1987).

75. Crowley v. Board of Educ., 513 N.Y.S.2d 792 (App. Div. 1987). Inexplicably, the court appeared to allow for the arbitrator to misconstrue the applicable external law, which runs counter to the cases in the "Standard of Review" section *supra*.

76. *In re* United Fed'n of Teachers, Local 11, 522 N.Y.S.2d 572 (App. Div. 1987).

77. School Dist. v. Northwest United Educators, 401 N.W.2d 578 (Wis. 1987).

78. Board of Educ. v. Yonkers Fed'n of Teachers, 514 N.Y.S.2d 465 (App. Div. 1987).

The court ruled that the arbitrator had exceeded his authority in ordering the reinstatement, because that was a nondelegable duty of the school committee.[79] The case was remanded back to the arbitrator to determine what other remedy, if any, would be proper.

In the final case in this subsection, an arbitrator in Indiana had awarded certain teachers a 10% bonus. The court vacated the award, holding that the provision in the collective bargaining contract that authorized an arbitrator to fashion any remedy he felt appropriate was contrary to state law.[80]

Just as for arbitration awards, the majority of labor board decisions were judicially sustained. For example, the Michigan Court of Appeals upheld the decision of the Michigan Employment Relations Commission that had ruled that a school district's unilateral increase in the number of class periods taught per day constituted an unfair labor practice.[81]

Likewise, in Oregon the appellate court upheld the Employment Relation Board's (ERB) decision that a school district committed an unfair labor practice when it refused to reduce to writing an agreement that was recommended by a fact finder and that was accepted by the school district's negotiating team. Reflecting the aforementioned deferential standard, the court admitted that the school district's view was not necessarily erroneous but affirmed the ERB's decision, because its findings were supported by substantial evidence and its conclusions were not irrational.[82]

The same court upheld the Oregon ERB's decision that an unfair labor practice had been committed by the school district in dismissing a secretary. The court affirmed ERB's finding that the secretary's behavior, in leaving the school one hour early to ride on the band bus, did not amount to flagrant misconduct, because the agency's opinion was a carefully reasoned evaluation of the parties' agreement and of the evidence.[83]

A Pennsylvania case shows that arbitral award can in some circumstances be reviewed under an administrative agency's unfair labor practice jurisdiction and that the agency need not adopt the recommended decision of its hearing examiner. After the union won in arbitration, the defendant-

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79. School Comm. v. Boston Teachers' Union, Local 66, 514 N.E.2d 679 (Mass. Ct. App. 1987).

80. Gary Teachers Union Local No. 4 v. Gary Community School Corp., 512 N.E.2d 205 (Ind. Ct. App. 1987).

81. Kent County Educ. Ass'n v. Cedar Springs Pub. Schools, 403 N.W.2d 494 (Mich. Ct. App. 1987).

82. Cascade Bargaining Council v. Jefferson County School Dist. No. 509-J, 732 P.2d 54 (Or. Ct. App. 1987).

83. Oregon School Employees Ass'n v. Pendleton School Dist. 16R, 735 P.2d 204 (Or. Ct. App. 1987), *review denied*, 742 P.2d 1186 (Or. 1987).

college paid the aggrieved employee at the lower of two rates specified in the collective bargaining agreement. The union then filed an unfair labor practice charge with the Pennsylvania Labor Relations Board (PLRB), and the PLRB hearing examiner ruled that the college had complied with the arbitrator's award, but the PLRB reversed his ruling, ordering the college to pay the grievants at the higher rate specified in the collective bargaining agreement. The appellate court affirmed, finding the board's findings to be supported by substantial evidence and its conclusions not to be capricious, arbitrary, or illegal.[84]

Similarly, New York's appellate court upheld decisions of that state's PERB. In one such case, the court upheld PERB's dismissal of the teachers' claim that the school district had changed their health insurance program in violation of past practice.[85] The court reasoned that while past practice included the provision of a health insurance benefit, it did not prescribe any specific program. In another such case, the same court affirmed PERB's dismissal of community college employees' claim that a reduction in their work assignment was an illegal retaliation for their complaining about the condition of employment of other employees. New York's PERB interpreted the collective bargaining statute to cover only those employees seeking to form or being represented by a union; in this case the teachers were not seeking to organize, but had merely met informally to discuss the conditions of their employment. Finding this conclusion to have a rational basis, the court affirmed; the case is currently on appeal to the state's highest court.[86]

Two cases represented the middle road between judicial affirmances and reverals of labor board decisions, instead being remands for further findings and proceedings. In one such case, an appellate court remanded a case back to California's PERB to determine whether the employer could legitimately refuse to reclassify a secretary on the basis of her union activity. While her union activity was protected conduct, the issue remanded to the PERB was whether the school district could discriminate against her for participating in that protected activity, when she later sought reclassification as a "confidential secretary."[87] In the second such case, a Florida court similarly remanded a case back to the Public Employment Relations Commission (PERC) to determine whether a principal's decision to reprimand a cafeteria worker was motivated by the employee's

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84. State Sys. of Higher Educ. v. Pennsylvania Labor Relations Bd., 528 A.2d 278 (Pa. Commw. Ct. 1987).

85. Unatego Nonteaching Ass'n v. New York State Pub. Employment Relations Bd., 522 N.W.2d 995 (App. Div. 1987).

86. Rosen v. Public Employment Relations Bd., 510 N.Y.2d 180 (App. Div. 1986), *appeal granted*, 513 N.E.2d 1309 (N.Y. 1987).

87. McPherson v. Public Employment Relations Bd., 234 Cal. Rptr. 428 (Ct. App. 1987), *review denied*, 189 Cal. App.3d 293 (Cal. 1987).

past reports of school health and safety violations, which was protected conduct.[88] The PERC had used the improper standard that antiunion motivation was necessary to find that the employer had committed an unfair labor practice.

In three cases, one each in Florida, Pennsylvania, and Illinois, the courts overturned labor board decisions. In the Florida case the court found that the PERC had exceeded its statutory authority in ordering that a school board give a union access to a bulletin board.[89] Also finding that the PERC order was too vague and overbroad regarding distribution of union material on school premises, the court laid out specific guidelines regarding when and where solicitation was permitted. In the Pennsylvania case, the appellate court reversed a PLRB order that allowed the employer to deduct unemployment compensation benefits from back wages after an employee was reinstated.[90] In the Illinois case, the appellate court reversed the Educational Labor Relations Board's order that a school district provide the union almost unqualified discovery on matters that transpired during closed session strategy sessions of the board regarding a strike and negotiations.[91] Disagreeing with the ELRB, the court held that the school board had properly asserted a qualified privilege regarding the closed session strategy sessions.

Statute-based Claims

Interpretation of Collective Bargaining Legislation. In general, courts, rather than arbitrators or labor boards, are the ultimate arbiters as to the meaning of collective bargaining and related statutes. In Texas, for example, the court of appeals held that while the state statute, which is far from a full collective bargaining act, gave public employees the right to present grievances, it did not give the representative any claim for damages against an individual or agency who retaliated against that representative.[92]

In Iowa the state supreme court interpreted the state's Public Employment Relations Act to include some substitute teachers.[93] More specifically, the court interpreted the Act's four-month inclusion require-

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88. School Bd. v. Lee County School Bd. Employees Local 780, 512 So. 2d 238 (Fla. Dist. Ct. App. 1987).

89. School Bd. v. Public Employees Relations Comm'n, 513 So. 2d 1286 (Fla. Dist. Ct. App. 1987).

90. Association of Pa. State College & Univ. Faculties v. Pennsylvania Labor Relations Bd., 532 A.2d 60 (Pa. Commw. Ct. 1987).

91. Illinois Educational Labor Relations Bd. v. Homer Community Consol. School Dist. No. 208, 514 N.E.2d 465 (Ill. App. Ct. 1987).

92. Bagg v. University of Tex. Medical Center, 726 S.W.2d 582 (Tex. Ct. App. 1987).

93. Iowa Ass'n of School Bds. v. Iowa Pub. Employment Relations Bd., 400 N.W.2d 571 (Iowa 1987).

ment to mean that if an employee was employed for any service during each month for four consecutive months, he would be eligible for coverage under the Act.

In a jurisdictional case currently on appeal to the state's highest court, an Illinois appellate court interpreted the state's labor relations act to require that disputes between teachers and their unions that arose from the filing of grievances had to be contested to the state Educational Labor Relations Board, with appeal to the Illinois appellate court.[94] The school district's bypassing of the ELRB to the circuit court, therefore, had been improper because the circuit court lacked jurisdiction.

Finally, the Supreme Court of Connecticut interpreted a state collective bargaining statute that provided for mediation and arbitration to apply only to the process of bargaining for a new contract, not to resolve disputes during the term of an existing contract.[95]

Interrelationship with Other Laws

Litigants sometimes challenge rights or procedures under collective contracts or statutes because they appear to conflict with those under other applicable laws. Several cases in 1987 fell in that category. In two cases the applicable laws were city charters. In one of these cases, a proposed San Francisco city charter provision required voter approval of any modification, deletion, or addition of city employee benefits. Several teacher organizations claimed that the provision would conflict with the state's meet-and-confer statute. The court disagreed, finding instead that the city's duty to meet and confer on employee benefits was in no way infringed upon by a city charter provision that would allow the electorate to vote on employee fringe benefits.[96]

In the second such case, a school board in Connecticut challenged the State Board of Labor Relations' decision that the district had committed a "refusal to bargain," which was a prohibited labor practice. Having determined that the city charter required that certain collective bargaining contract provisions be submitted to the city council for approval, the school district submitted the contract in its entirety after ratification to the city council, resulting in several contractual revisions. The state's highest court ruled that since the contract in question had not only been ratified and implemented but also had expired, the issue was moot.[97]

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94. Board of Educ. v. Compton, 510 N.E.2d 508 (Ill. App. Ct. 1987), *appeal granted*, 545 N.E.2d 101 (Ill. 1987).

95. Hartford Principals' and Supervisors' Ass'n v. Shedd, 522 A.2d 264 (Conn. 1987).

96. United Pub. Employees, Local 390/400 v. San Francisco, 235 Cal. Rptr. 477 (Ct. App. 1987).

97. Board of Educ. v. Connecticut Bd. of Labor Relations, 530 A.2d 588 (Conn. 1987).

In other cases the applicable laws were federal statutes. One such case involved a title VII sex discrimination claim against a board of education in Illinois. The board moved to dismiss the federal court suit because in a separate action the Illinois Supreme Court had already ruled on the matter, holding that the arbitrator was without authority to award the plaintiff-teachers' reinstatement. The Seventh Circuit Court of Appeals held that the state court action was *res judicata* on the federal title VII claim, because the state court's judgment was based on the arbitrator's lack of jurisdiction, not on the merits of the case.[98]

Similarly, in another federal case in Illinois, the United States district court ruled invalid a provision in a collective bargaining contract which provided that the employer could terminate a grievance if the employee sought resolution in another forum.[99] In this case the employee filed an EEOC complaint based on age discrimination. Since the union and the employees could not waive the employee's title VII rights, the employees' grievance under the collective bargaining contract could not be dismissed.

In a final federal case, a group of female bus drivers filed a title VII sex discrimination suit against a school district that had assigned bus drivers with less seniority, contrary to the collective bargaining agreement, to routes to which the women felt entitled. The routes in question served residents of a village of Hasidic Jews who sent their male children to a private males-only religious school. When the male students refused to board the bus driven by women, the school district attempted to accommodate their religious beliefs by reassigning the drivers. After pursuing the matter to arbitration, the female bus drivers attempted to pursue the discrimination claim in court. They succeeded in having the claim heard; the federal district court ruled that while the arbitrator's findings might be considered as evidence, the findings had no issue or claim preclusion effect on the title VII sex discrimination action.[100]

In other cases the applicable laws were state statutes governing termination for cause or for economic reasons. In Oregon the question was whether a discharged teacher's claim was governed by the state fair dismissal law or the state public employee collective bargaining act. The state appellate court ruled that since the grievance filed in the case actually was directed at the school district's compliance with the collective bargaining agreement, the collective bargaining statute applied.[101]

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98. Kirk v. Board of Educ., 811 F.2d 347 (7th Cir. 1987).

99. EEOC v. Board of Governors of State Colleges and Univs., 665 F. Supp. 630 (N.D. Ill. 1987).

100. Bollenbach v. Monroe-Woodbury Cent. School Dist., 659 F. Supp. 1450 (S.D.N.Y. 1987).

101. Luoto v. Long Creek School Dist., 747 P.2d 370 (Or. Ct. App. 1987).

In a somewhat similar case a teacher in Illinois had been dismissed under a collective bargaining provision that specified procedures for reduction-in-force (RIF). An alternative statute in the state school code provided different procedures for terminations for incompetence. The appellate court found that the real reason for the dismissal was incompetence; thus, the teacher had been improperly discharged without the alternative statute's requirements of due process, including a warning, opportunity to remedy deficiencies, and a hearing.[102]

In another such situation, a teacher in Florida appealed a circuit court decision to send his termination case to arbitration. The teacher contended that this decision conflicted with a separate section of the Florida code that allowed dismissals to be appealed to the district court of appeal. The appellate court ruled that the collective bargaining agreement appropriately provided for arbitration as an alternative to the statutory appeal process and, thus, that the case was properly sent to arbitration for a decision.[103]

Two Illinois cases presented other state statutory interrelationship issues. In one of these cases, the state legislature passed a statute requiring school nurses hired on or after July 1, 1976 to be certified, but allowing those with bachelor's degrees who were already employed to continue working without certification. The plaintiff was employed as a school nurse on said date, but she did not complete her bachelor's degree until the following year. Later, because of a reduction-in-force, the plaintiff was reduced from a five-day to a three-day work week, while a certified nurse with fewer years of experience remained as a full-time employee. The plaintiff claimed that this action breached the collective bargaining agreement. However, the appellate court ruled that the school district had properly assessed the plaintiff's experience, giving her seniority credit only for those years after she had obtained certification.[104]

In the other Illinois case, the same court was faced with determining seniority and "bumping" rights when teachers were involved in a RIF. After reviewing the Community College Tenure Act, the Education Labor Relations Act, and the collective bargaining agreement, the court held that the faculty members had seniority rights only over other tenured employees, rather than part-time instructors, and that the

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102. Schafer v. Arlington Heights Board of Educ., 510 N.E.2d 1186 (Ill. App. Ct. 1987), *appeal denied*, 515 N.E.2d 126 (Ill. 1987).

103. DeSoto County Teachers Ass'n v. District School Bd., 502 So. 2d 928 (Fla. Dist. Ct. App. 1987), *review denied*, 511 So. 2d 298 (Fla. 1987).

104. Verdeyen v. Board of Educ., 501 N.E.2d 937 (Ill. App. Ct. 1987), *appeal denied*, 508 N.E.2d 737 (Ill. 1987).

"bumping" rights referred to positions rather than to courses.[105]

Similarly, teachers in Michigan contended that their layoffs violated the state's teachers' tenure act. However, the appellate court ruled that neither the layoffs nor the collective bargaining agreement, under which the layoffs and early retirements had been negotiated, violated the tenure act.[106]

In another RIF case, a Minnesota appeals court allowed and affirmed a breach of contract action, finding that the teacher had accrued and retained seniority rights because of a grandfather clause in the collective bargaining agreement that rendered defective his layoff under the state's RIF statute.[107] Conversely, an Iowa appeals court ruled that a school district complied not only with applicable state law but also with the collective bargaining agreement in RIFfing one of its teachers.[108]

Other cases concerned state statutory interrelationship issues relating to employer actions other than termination. In one such case, a group of teachers in Washington brought an action alleging that their school district's use of supplemental contracts violated the state's continuing statute. The court agreed, ruling that the teachers did not waive their rights to contest the supplemental contracts by agreeing to them in their collective bargaining agreement and that the school district could not divide teachers' contracts under basic and supplemental rubrics in order to defeat the state's continuing contract statute.[109]

In Oregon several state statutes were at issue when an education association sought to have a collective bargaining agreement reduced to writing and enforced. After two board members had informed him that they agreed with contract provisions, their spokesperson drafted a proposal that was accepted by the association. The appellate court ruled that the contract was valid, even though one state statute required approval of contracts by the board at a regular or special meeting and another statute required that governing bodies meet in public.[110] Noting that the school board could have complied with the statutes by ratifying the agreement in public, the court ruled that the district was bound by the contract.

In California, a teacher brought suit against a school board because

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105. Biggiam v. Board of Trustees, 506 N.E.2d 1011 (Ill. App. Ct. 1987), *appeal denied*, 515 N.E.2d 101 (Ill. 1987).

106. Board of Educ. v. Brisbois, 417 N.W.2d 84 (Mich. Ct. App. 1987).

107. Jenson v. Joint Indep. School Dist., 408 N.W.2d 203 (Minn. Ct. App. 1987).

108. Pocahantas Community School Dist. v. Levene, 409 N.W.2d 698 (Iowa. Ct. App. 1987).

109. Kelso Educ. Ass'n v. Kelso School Dist. No. 453, 740 P.2d 889 (Wash. Ct. App. 1987).

110. South Benton Educ. Ass'n v. Monroe Union High School Dist. No. 1, 732 P.2d 58 (Or. Ct. App. 1987), *review denied*, 736 P.2d 565 (Or. 1987).

he felt that his salary classification, which was part of the collective bargaining agreement, violated the salary scale in the state's education code. Ruling in favor of dismissal, the appellate court held that an incorrect placement on the salary scale would be an unfair labor practice, which fell within the exclusive jurisdiction of the Public Employment Relations Board.[111] Thus, the teacher was required to exhaust his administrative remedies prior to pursuing the matter in court.

Reaching a different result, the First Circuit Court of Appeals ruled that an employee's lawsuit over his termination was a straight breach of contract action and, therefore, that the employee was not required to exhaust his administrative remedies provided in the collective bargaining contract.[112] For the same reason, the court held that suit was not barred by the statute of limitations for collective bargaining claims. Nevertheless, rather than reinstatement and backpay, the teacher was awarded $6,000 in actual damages as a "make-whole" remedy.

Similarly separating collective bargaining and other rights, a California appeals court granted a writ of mandamus to San Francisco teachers who sought reclassification under a salary schedule that had been provided in a collective bargaining agreement, ruling that said salary schedule did not comply with the state education code.[113]

In the final case in this section, a board of education appealed a decision by New York's Unemployment Insurance Appeal Board (UIAB) which had granted unemployment benefits to a former janitor. Rejecting the school board's contention that the UIAB was bound by an arbitrator's decision that the janitor had been dismissed for just cause, New York's highest court concluded that the UIAB was required to give collateral estoppel effect to the arbitrator's findings regarding the claimant's insubordination but was free to make its own independent conclusion as to whether the insubordination constituted misconduct justifying a denial of unemployment benefits.[114]

Rights on Expiration of Contracts

Occasionally lawsuits are brought addressing the effects of a collective bargaining contract after its expiration date. In two cases in 1987, legal obligations were held to survive the contract's expiration. In the first case, following the weight of authority in other jurisdictions, an appellate court in Illinois held that annual salary increases were "status

111. McCammon v. Los Angeles Unified School Dist., 241 Cal. Rptr. 1 (Ct. App. 1987).

112. Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 822 F.2d 188 (1st Cir. 1987).

113. San Francisco Teachers' Ass'n v. San Francisco Unified School Dist., 242 Cal. Rptr. 352 (Ct. App. 1987).

114. *In re* Guimarales, 510 N.Y.S.2d 588 (N.Y. 1986).

quo" and, thus, that the district was required to implement the increases while negotiations for a new contract were pending.[115] In the second case, an appellate court in Pennsylvania ruled that a school district's refusal to honor the arbitration provisions of a contract after its expiration was an unfair labor practice, because, in the court's view, the parties had agreed to extend the contract agreement during the hiatus between contracts.[116]

However, in another case, an appellate court in Ohio took the opposing view, ruling that the school district had no duty under the state's collective bargaining act to continue deducting union dues and fair-share fees after the collective bargaining contract had expired.[117]

In the final case in this category, a New York appellate court, in effect, ducked the issue. When a community college faculty challenged the PERB's decision upholding the college's refusal to implement salary increments after a collective bargaining agreement had expired, the court found that the subsequent contract, which applied retroactively to the expiration of the previous agreement, rendered the issue moot.[18]

CONCERTED ACTIVITY

Several cases in 1987 concerned issues arising from school strikes. In a Louisiana case, a school district had deducted strike days in compiling seniority lists for implementation of a RIF. The appellate court remanded the case to the trial court to determine whether some of the teachers would have been laid off, regardless of their inappropriate placement on the seniority lists, because of the work stoppage.[119]

Alleged strike misconduct gave rise to a Vermont case in which the state's highest court upheld a Labor Relations Board (LRB) decision to not issue unfair labor practice charges against both the school board and the teachers' association.[120] The court ruled that the LRB did not abuse its discretion in holding that the proper forum for determining misconduct of striking teachers would be a compliance proceeding.

Other cases concerned school employees' right to strike in various jurisdictions. In Massachusetts the appeals court upheld the Labor Rela-

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115. Vienna School Dist. No. 55 v. Illinois Labor Relations Bd., 515 N.E.2d 476 (Ill. App. Ct. 1987).

116. Greater Nanticoke Area School Dist. v. Area Educ. Ass'n, 520 A.2d 955 (Pa. Commw. Ct. 1987).

117. Ohio Ass'n of Pub. School Employees v. New Miami Local School Dist. Bd. of Educ., 509 N.E.2d 973 (Ohio Ct. App. 1986).

118. Faculty Ass'n of Suffolk Community College v. Public Employment Relations Bd., 508 N.Y.S.2d 591 (App. Div. 1986).

119. St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Board, 503 So. 2d 69 (La. Ct. App. 1987).

120. Hinesburg School Dist. v. Vermont NEA, 522 A.2d 222 (Vt. 1986).

tions Commission's dismissal of a petition regarding a bus drivers' strike, ruling that the commission rightfully had found that the bus drivers were independent contractors and, as such, did not fall within the statutory prohibition against public employee strikes.[121]

Similarly, a school district in Pennsylvania was unsuccessful in its attempted injunction against the teachers' "selective strikes." The state's intermediate appellate court held that the selective strikes could only be enjoined under the state's public employee bargaining act if they created a "clear and present danger or threat to the health, safety, and welfare of the public."[122] The court concluded that a total loss of two hours and ten minutes did not create such a danger and, thus, reversed the trial court's order for an injunction. In a footnote the court rejected, "under these facts, the [d]istrict's argument that the strike violated the right to education guaranteed to all handicapped children under . . . the Education of the Handicapped Act."[123]

Similarly, a Minnesota appeals court reversed a lower court order for a temporary injunction against a teachers' association, ruling that the public school teachers' right to strike matured after the teachers' contract had expired and they had mediated for thirty days rather than when the teachers actually filed a notice of their intent to strike.[124]

MISCELLANEOUS DECISIONS

Various cases presented issues that did not fall within the foregoing sections of this year's Bargaining chapter. The first such case was a remand in *Chicago Teachers Union, Local No. 1 v. Hudson*[125] from the Supreme Court to the federal district court for a determination of the appropriate remedy. As one step in this remanded proceeding, the district court denied the plaintiff's motion for a certification of the class of nonunion members to receive monetary relief.[126]

Two of the miscellaneous cases involved attorneys or attorney fees. In one case the plaintiff teachers moved to disqualify a law firm representing the school board because one member of the firm had been the board's chief negotiator for the collective bargaining agreements under which the teachers sued for breach of contract and fraud. The appellate court affirmed the trial court's disqualification of the law firm, because

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121. School Comm. v. Labor Relations Comm'n, 512 N.E.2d 1151 (Mass. Ct. App. 1987).

122. Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area School Dist., 523 A.2d 1183, 1189 (Pa. Commw. Ct. 1987), *appeal denied*, 533 A.2d 715 (Pa. 1987).

123. 523 A.2d at 1187.

124. Central Lakes Educ. Ass'n v. Independent School Dist. No. 743, 411 N.W.2d 875 (Minn. Ct. App. 1987).

125. 106 S. Ct. 1066 (1986).

126. Hudson v. Chicago Teachers' Union, 117 F.R.D. 413 (N.D. Ill. 1987).

it was obvious that the former chief negotiator could be called as a witness in the case, and further, that the disqualification would not work on undue hardship on the board.[127] In the other case, which involved a determination of attorney fees due when an unsuccessful union presidential candidate challenged the election, the federal district court held that attorney fees could be awarded at each stage of litigation in which the union received a common benefit.[128] Accordingly, some of the requested fees were allowed, and others were not.

In Washington a welding instructor sued a college after his dismissal. The appellate court held that the college had adequately complied with the collective bargaining provision requiring an attempt to resolve matters without formal dismissal procedures.[129] Further, the court rejected the employee's claim that he was terminated for exercising his first amendment rights, because it found that the college would have reached the same decision in the absence of constitutionally protected conduct.

In New York, an appellate court upheld a parity clause whereby members of a department chairman's association were entitled to take advantage of a "cash in" benefit contained in the teacher union's agreement with the school district.[130]

In Ohio, an appellate court granted a writ of mandamus to compel a board of education to pay the plaintiff-teacher for accrued, unused sick leave.[131] The board contended that the collective bargaining agreement, which required the conversion of such sick leave into severance pay, prevailed over contrary statutory provisions, but the court held that, at the time, statutory law controlled.

Finally, a Michigan teacher brought a breach of contract action against his school district after he was denied seniority for the years he served as an administrator. The appellate court ruled that the collective bargaining agreement, which was entered into during the time that the teacher had been an administrator and not a member of the bargaining unit, did not supersede his employment contract, which provided that seniority accumulated while one served as an administrator.[132]

CONCLUSION

The numbers of appellate court cases regarding collective bargaining in education reached an all-time high in 1987. The notion that

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127. Hoerger v. Board of Educ., 514 N.Y.S.2d 402 (App. Div. 1987). For a separate proceeding in this litigation, see note 22 and accompanying text.
128. Donovan v. Local 6, Washington Teachers Union, 655 F. Supp. 1 (D.D.C. 1986).
129. Sinnott v. Skagit Valley College, 746 P.2d 1213 (Wash. Ct. App. 1987).
130. Lopez v. Board of Educ., 522 N.Y.S.2d 921 (App. Div. 1987).
131. State *ex rel.* Runyan v. Henry, 516 N.E.2d 1261 (Ohio Ct. App. 1987).
132. Champion v. Kenowa Hills Pub. Schools, 402 N.Y.2d 62 (Mich. Ct. App. 1986).

education employers and their unionized employees will resolve their differences at the bargaining and arbitration tables without resort to the courts remains a distant dream.

Little has changed this year in regard to the substantive and procedural law that applies in such educational bargaining cases. The decisions this year generally applied well established labor law concepts, with variations due largely to factual and jurisdictional differences.

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PUPILS

Henry S. Lufler, Jr.

Introduction / 67
Public School Assignment, Tuition, and Transportation / 68
Tuition and Assignment / 68
Transportation / 70
Home Instruction / 71
Compulsory Attendance / 75
Bilingual and Bicultural Programs / 76
Private and Parochial Schools / 79
Substantive Rights of Students / 80
Search and Seizure / 80
First Amendment Religious Rights / 83
First Amendment Freedom of Expression / 88
Sanctions for Student Misconduct / 93
Suspensions and Expulsions / 93
Corporal Punishment / 96
Desegregation / 98
Systemwide Remedies / 98
Cross-district Remedies / 100
Desegregation Plan Oversight / 104

INTRODUCTION

The sharp increase in the number of cases that involve school antidrug policies, seen in the "Pupils" chapter last year, continued in 1987. These cases are reported in both the search and seizure and the suspension and expulsion sections. Courts continued to support school policies that contain an automatic suspension or expulsion penalty for school drug possession.

First amendment religion cases also continued to increase in number, with the United States Supreme Court ruling that there was no secular purpose in a state statute that required "balanced" treatment of creation science when evolution was taught. Other religion cases addressed secular

humanism, graduation ceremony invocations, and the right of students to "opt out" of portions of a school's reading curriculum. A new grouping of cases in this year's chapter under the heading "home instruction" contains cases raising a medley of first amendment and other constitutional issues. The right of parents to educate their children at home remains a fertile ground for litigation.

Several corporal punishment cases, with what courts characterized as brutal treatment of students, were heard in 1987. The long-dormant issue of substantive due process violations in corporal punishment cases was heard in two cases by circuit courts of appeal.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

State statutes that determine the residence of public school children and the charging of tuition to nonresidents were challenged in several 1987 assignment cases. The equal protection clause was used successfully by plaintiffs in two cases. In the first, a Texas district court held that children living with their grandmothers were residents of the grandmothers' school district for educational purposes.[1] The children resided in the Livingston Independent School District, which argued that it had no obligation to educate them because the grandmothers had never filed for legal guardianship status. The district court disagreed, finding that the children had been under the "lawful control" of their grandmothers for several years and that their residence was not undertaken for the primary purpose of attending school. As applied to children in such cases, the court held that the insistence that there be a formal guardianship proceeding violated the children's equal protection rights.

A Pennsylvania statute that sought to differentiate between nonresident children also fell to an equal protection challenge. The case involved children removed from their parental homes by court order who were placed with foster parents. The foster parents received state compensation for providing the child care. The challenged statute required local districts to provide free education to children in institutions and to those in uncompensated foster arrangements, but not to children where the foster parents were compensated.[2] The district court sought to find an important government interest in requiring the payment for children in the third category, but could find none. The section of the statute containing the provision was therefore found to violate the equal protection clause.[3]

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1. Byrd v. Livingston Indep. School Dist., 674 F. Supp. 225 (E.D. Tex. 1987).
2. 24 Pa. Stat. Ann. § 13-1305(b) (1970).
3. Nancy M. v. Scanlon, 666 F. Supp. 723 (E.D. Pa. 1987).

A New York district court considered the case of a mother and daughter who had been assigned by a social service agency to temporary housing in Yonkers, having spent one night in Mount Vernon, New York.[4] The public school systems in the two municipalities each held that the other was responsible for the child's education. The case was made more complicated by the fact that the mother's attorney sought relief in federal court without following the state's residency determination administrative appeal procedures. At no time, however, had the mother been told of the administrative appeals process. A variety of legal challenges to state statutes and against the state commissioner of education were filed, but the court declined to rule on these, confining its ruling to the issuance of a preliminary injunction requiring Yonkers to educate the child as long as the child's residency continued in that district. The court also expressed its hope that the state would be able to address the question of school residence for homeless children before it was necessary to enter a final ruling in the case.

In a case that also raised questions about social services placements and tuition, a New York appeals court held that a social service residential placement did not require the receiving district to educate the child.[5] The court ruled that the district where the child had resided for a number of years was obligated to pay tuition for the child, even after the state assumed custody.

Two companion cases addressing the power of the state superintendent to order tuition transfers were heard by the Supreme Court of Montana.[6] The parties contested whether the local school board had ignored the criteria enumerated in state statutes for deciding tuition requests and questioned the appropriate latitude granted to the county and state superintendents in reviewing local board decisions. In a split decision, the Montana high court held that the state superintendent could not go beyond the printed record in reviewing the case, even though the local board had ignored several statutory criteria it was to consider in such cases. In addition, a lower court that looked at the county superintendent's decision was found to be correct when it held that the decision could be overturned only if it was "clearly erroneous," based on the criteria considered. In dissent, two justices of the high court argued that the state superintendent was right in considering all the criteria in making his decision.

A city school district and a county district in which the city was

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4. Orozco v. Sobol, 674 F. Supp. 125 (S.D.N.Y. 1987).

5. Board of Educ., Commack v. Port Jefferson Union Free School Dist., 520 N.Y.S.2d 793 (App. Div. 1987).

6. Frazer School Dist. No. 2 v. Flynn, 732 P.2d 409 (Mont. 1987); Frazier [sic] School Dist. No. 2 v. Forsness, 734 P.2d 1218 (Mont. 1987).

located filed suit, each seeking to educate students who lived in a part of the county that had been annexed to the city.[7] The Alabama city argued that state law required the students to attend their schools, but the appeals court affirmed a lower court ruling that state statutes contained no such requirement. The appeals court did find a provision that permitted the collection of fees from elementary students attending a public school outside their district, which the court read as permitting students a choice in attendance. On a motion for rehearing, the court refused to address the qeustion of transportation fees, since it had not been raised in the original suit.

An unincorporated parents' group in Jackson County, Florida, challenged the transfer of all students in grades seven and eight who were attending a K-8 elementary school to a K-12 school in the district.[8] The appeals court upheld a lower court decision that the school board's decision was not an abuse of its discretion to act on pupil assignments.

Transportation

North Dakota's statutes permit nonreorganized school districts to levy a school bus service charge to help support the cost of transporting students to school. Two parents protested the $97-per-child annual fee assessed by the Dickinson School District, claiming that the fee violated article VIII, section 2 of the North Dakota Constitution, which calls for a "free" public education. In addition, the plaintiffs argued that their equal protection rights had been violated because state law provided that all reorganized districts had to provide free transportation. It was not claimed that the parents were unable to afford the fee; in fact, as an alternative to paying the bus fee, the parents transported the children by car at an admittedly greater cost than the bus charge.

A lower court ruled in favor of the school district and, by an even vote, the North Dakota Supreme Court upheld the lower court decision.[9] Both affirming and dissenting justices agreed that transportation was not included in the state constitutional provision for a "free" education. There was, in fact, a long-standing legislative practice of asking parents to pay part of the transportation costs. There was a split, however, on the question of the equal protection claim. The justices affirming the lower court used a rational relationship test, finding that the use of the charge only in unreorganized districts served the state's interest in urging school district reorganization. The dissenting justices, on the

7. Phenix City Bd. of Educ. v. Teague, 515 So. 2d 971 (Ala. Civ. App. 1987).

8. SOS Alford v. School Bd. of Jackson County, 511 So. 2d 439 (Fla. Dist. Ct. App. 1987).

9. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D. 1987).

other hand, used the greater "intermediate level of review" in assessing the equal protection claim, observing that some children, if not the plaintiffs, might be cut off from a public education by the charge. The school district did not waive the fee for low-income parents, causing the dissenting justices to conclude that the fee violated the state's equal protection clause. Nevertheless, on an even vote, the entire lower court decision was upheld and the fee for transportation was allowed to continue.

Home Instruction

Challenges to compulsory attendance laws by members of fundamentalist religious sects continued unabated in 1987. Parents wishing to educate their children at home or in small, unaccredited private schools continued to raise a variety of issues that can be grouped in three categories. First, it was argued that the first amendment afforded protection from state requirements that home instruction parents or unaccredited schools report on the attendance of students or on the curriculum being used. Second, plaintiffs advanced the claim that the Supreme Court's decision in *Wisconsin v. Yoder*[10] provided protection from state attendance requirements, arguing that their sect was like the Amish in *Yoder* and that the equal protection clause therefore required approval of their program. Finally, plaintiffs challenged state requirements that the home instruction or small academy curriculum be "essentially equivalent" to that afforded in the public schools, on the grounds that this requirement was overly vague. In recent years, plaintiffs in these cases have succeeded most often with the third line of attack. In 1987 cases, courts found none of the three arguments to be persuasive.

All three claims were advanced in an Iowa case that was heard by the Eighth Circuit Court of Appeals. Litigants contesting Iowa's compulsory attendance and home instruction laws have been active in both state and federal courts over the past decade. Iowa's law in this area is more restrictive than most, requiring that private schools report annually the names of students and teachers and the curriculum being used. The law also requires equivalent instruction by certified teachers through grade eight. In 1985, a district court upheld the statutes, but found that "equivalent" instruction, undefined by the statute, was overly vague.[11]

Both parties appealed and the Eighth Circuit Court affirmed in part and reversed in part.[12] The plaintiffs in the current case claimed that the

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10. 406 U.S. 205 (1972).

11. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (D. Iowa 1985). *See* The Yearbook of School Law 1986 at 76-7.

12. Fellowship Baptist Church v. Benton, 815 F.2d 485 (8th Cir. 1987).

state reporting requirements violated their belief in the "Headship of Christ" and in the separation of church and state. While they were willing to have parents report data, they were unwilling to have schools make the reports. The appeals court upheld the lower court ruling in favor of the requirement, finding that the burden on the plaintiff's religious rights was very minimal, if in fact it was present at all.

The certification requirement also was upheld. The court observed that while the plaintiffs claimed that the license requirement interfered with "God's calling to teach," the plaintiffs did not object to state licensing for other occupational calls, such as those heard by doctors and lawyers. Claims that the licensing requirement violated the plaintiff's free exercise rights or that they were entitled to a "*Yoder* exemption" also were rejected. The court noted that the church was fully integrated into the larger society, with some members sending their children to local public schools.

The appeals court remanded two portions of the lower court decision. Noting that the state had promulgated equivalent instruction standards in 1986, the court remanded the claim that "equivalent instruction" was overly vague back to the district court to be reconsidered in light of the new rules. The lower court also had denied attorney's fees for the Keokuk school district, holding that Keokuk was the prevailing party in the case but that the plaintiffs' case was not so frivolous as to require the plaintiffs to pay the fees. The appeals court reversed, finding that the plaintiffs "were aware that the arguments they presented to the district court did not present any issue of first impression, but in fact had been rejected by numerous courts."[13] The court found that the school was included as a defendant in the case only because the district continued to report children to the county attorney who were attending the plaintiffs' school.

Massachusetts law requires that home instruction programs be "equal in thoroughness and efficiency, and in the progress made therein" to programs offered in the public schools. Home instruction parents are required to submit the curriculum materials used and the qualifications of instructors to local school administrators for approval and to use standardized tests to ensure that children are learning at home. A federal court had ruled in 1984 that the home instruction statute was not overly broad[14] and similar issues were before the Massachusetts Supreme Judicial Court in 1987.[15] The plaintiffs in the case wished to educate their three children at home and, after meetings with the school committee

13. *Id.* at 499.

14. Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp. 81 (D. Mass. 1984). *See* The Yearbook of School Law 1986 at 78.

15. *In re* Charles, 504 N.E.2d 592 (Mass. 1987).

and administrators, declined to supply the required information.

While the parents raised a variety of challenges, the court held that the state's standards for reviewing private schools, plus accumulated case law, provided the criteria for review. The plaintiff's loss of first amendment religious rights and fourteenth amendment liberty interests were seen as less significant than the state's interest in ensuring that each child receives an education. The court went on to detail the rights of parents in presenting their school plans to school committees, including the right to a hearing and the right to modify their plans based on the hearing. While the requirements, including review and testing to measure student progress, were upheld, the high court remanded the case to a lower court to give the parties a chance to resolve their dispute u... 'er the guidelines offered in the decision.

A Massachusetts district court considered the issue of the extent to which local school administrators could monitor the teaching and programs in private religious schools to ascertain compliance with that state's "equal in thoroughness and efficiency" requirement. The law gives public school committees the obligation to approve the private schools operating within their boundaries. The New Life Baptist Church Academy, a small, newly formed fundamentalist school, challenged the East Longmeadow school committee's review, raising a variety of first and fourteenth amendment issues. Since the district court had ruled previously that the Massachusetts statute was not vague, nor was the process a denial of the rights of religious schools to operate,[16] the current court opinion focused on the methods that East Longmeadow was employing to review the academy's programs.[17]

The committee had requested information on the curriculum, on the school hours and the days the school was in session, on health and safety conditions at the school, and on the qualifications of the faculty. Public school officials insisted that teachers at the academy should have college degrees and that it would be necessary for them to observe academy classes being taught. Though the academy had made a number of changes as the result of conversations with school officials, such as changing the length of the academy school year, and had expressed a willingness to comply with all safety inspections, they claimed that it would be sinful for them to subordinate "God's judgment" on curriculum to that of the state. They agreed to teach the state-required subjects but would not allow visits to monitor compliance.

The district court concluded that it was not necessary for sincerely

16. Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp. 81 (D. Mass. 1984).

17. New Life Baptist Church Academy v. East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987).

87

held religious views to be consistent, citing *Thomas v. Review Board*,[18] holding that the plaintiffs' religious rights could be violated by some forms of state control, even though they did not object to other regulation. The court then used the three-part test in *Lemon v. Kurtzman*,[19] concluding that the methods employed by school officials to monitor the curriculum of the academy violated the establishment clause. The third of the *Lemon* tests, excessive government entanglement, was implicated, the court reasoned, because public school officials would have to spend significant time on the premises of the academy to monitor compliance. Two recent Supreme Court decisions were advanced to support this interpretation.[20]

The district court held that there were less restrictive ways to ensure that the state's valid interest in securing compliance with the statute could be met. The court held that the use of standardized tests to monitor progress would not involve entanglement.[21] The court also approved the concept of a follow-up involvement by public school officials when a student's test scores indicated problems. The details of how this might work were left to be worked out between the parties. Having used establishment clause analysis to substantiate its remedy, the court also was left with the conclusion that the establishment clause was no bar to requiring teaching credentials for private school instructors.[22] Rather than reaching a conclusion on this point, however, the court left this matter as an issue to be discussed by the parties.

This case is unusual, particularly in its development of a "least restrictive" regulatory approach for home instruction or private school analysis. The Massachusetts statute regulating private schools, however, contains powers for public school officials not found in most states. The academy in question also was willing to comply with more regulations than customarily is the case in similar litigation, leaving only the lengthy site monitoring as the central issue.

Ohio plaintiffs also argued that the state had less restrictive ways to ensure that children in home instruction programs were being educated than to seek prior program approval from local school superintendents.[23] Unlike the Massachusetts case just discussed, the Ohio Supreme Court

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18. 450 U.S. 707 (1981).
19. 403 U.S. 602 (1971).
20. Aguilar v. Felton, 473 U.S. 402 (1985) (on-site inspection of public school instruction and clinical guidance services in private schools to assure that teachers are providing secular education creates entanglement); Meek v. Pittinger, 421 U.S. 349 (1975) (surveillance of remedial and accelerated instruction and guidance, counseling, and testing in private schools by public school employees creates entanglement).
21. *See* Wolman v. Walter, 433 U.S. 229 (1977).
22. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).
23. State v. Schmidt, 505 N.E.2d 627 (Ohio 1987).

refused to find a constitutional violation. The plaintiffs had refused to submit their program for review and the court majority declined to decide prospectively whether the local superintendent would act arbitrarily. While two dissenting justices held that the lack of standards in the statutes constituted grounds for not complying with them, the majority maintained that there were adequate appeal processes within the statutes to address these issues and that the statutes did not infringe on the plaintiff's free exercise rights.

A Texas appeals court heard claims by home instruction parents who argued that they were exempt from compulsory attendance laws under the first and fourteenth amendments, the Texas Constitution, and "the word of God."[24] The parents argued their case without legal counsel, however, making it difficult for the court to determine how their free exercise rights were burdened by the compulsory attendance law. The court held that the first amendment prohibited it from deciding the ecclesiastical issue raised by the plaintiffs and found that they had failed to show that the lower court had made any reversible error.

Compulsory Attendance

In a compulsory attendance challenge heard by the Iowa Supreme Court, a couple seeking to educate their children at home raised a variety of constitutional challenges to the state's compulsory attendance laws. The state's supreme court, however, declined to hear the constitutional issues, holding instead that no crime had yet been committed because the statute requires children to attend school or be taught by a certified teacher for at least 120 days each year.[25] Since there were more than 120 days left in the school year, the court reasoned that the parents had yet to violate the law. This approach was sharply attacked by dissenting justices, who held that it "completely gutted" the compulsory attendance law. Waiting until a child had fewer than 120 days left in the school year before commencing prosecution has the effect of preventing the child's promotion to the next grade, because that number is the minimum number required.

A Maryland appeals court heard an appeal in a more traditional compulsory attendance case involving two mothers whose children missed between 70 and 86.5 days in the school year for a variety of reasons that a lower court had characterized as "insubstantial." They had been fined and given a suspended sentence by the court. On appeal, the plaintiffs used what the appeals court characterized as a "scatter gun" to raise a host of issues.[26] Several of them were related to fine

24. Howell v. State, 723 S.W.2d 755 (Tex. Ct. App. 1987).
25. State v. Trucke, 410 N.W.2d 242 (Iowa 1987).
26. *In re* Jeannette L., 523 A.2d 1048 (Md. Ct. Spec. App. 1987).

points about truancy determinations made by school officials that were irrelevant to the case at hand. Two issues, however, were of particular interest in the appeals court decision. The lower court had granted the plaintiffs' request for a jury trial, even though state statute clearly called for hearings in juvenile matters to be conducted without juries. On appeal, the plaintiffs challenged the granting of their own request, which the appeals court held could not be challenged since it was granted on their motion.

The case was remanded to consider the question of a proper penalty for the violation. The trial court had assigned a fine and a suspended sentence for each day of the alleged violation. To the appeals court, however, a clear reading of the statute permitted a fine for each day but a maximum ten-day sentence for the accumulated offenses.

A New York City juvenile who was detained by a police officer for being truant was convicted in a juvenile proceeding of assaulting the officer. In 1986, a New York appeals court held that police officers, in addition to attendance officers employed by the schools, had the power to enforce compulsory attendance laws.[27] The case was appealed to the Court of Appeals of New York. In affirming the lower court, the New York high court ruled that the failure of state statutes to specify that regular police officers could enforce truancy laws did not mean that they could not do so, since other provisions gave police the power to enforce all laws and ordinances in New York City.[28]

BILINGUAL AND BICULTURAL PROGRAMS

Four Louisiana parishes received federal funds under the Bilingual Education Act[29] for the fiscal years 1979-81, totaling between $477,000 and $765,000 for each parish. Each parish has a unique history and a significant population of non-English-speaking residents, two with concentrations of French-dialect speakers, one with a large number of Spanish-speaking residents, and a third with a large population speaking Italian. The United States Department of Education had made the bilingual education grants in 1979 and had conducted on-site reviews and annual evaluations, in each case praising the programs in the four parishes.

In 1981, the department responded to letters alleging misuse of the bilingual program funds by conducting a criminal investigation, visiting the school districts, and interviewing school officials. The investigators concluded in 1982 that the program had used federal funds to provide

27. *In re* Shannon B., 503 N.Y.S.2d 179 (App. Div. 1986).
28. *In re* Shannon B., 517 N.E.2d 203 (N.Y. 1987).
29. 20 U.S.C. §§ 3221-3262.

ineligible programs, primarily foreign-language instruction, and that ineligible students were participating in the programs. Only one of the four programs, however, had received a program audit, wherein it was discovered that fewer than the required 60% of the students in the program came from predominantly non-English-speaking homes. An internal appeal process within the department affirmed the findings, and the four parishes were ordered to return all the federal funds each had received since the program's inception.

Three of the school boards appealed to the Fifth Circuit Court of Appeals, claiming that they could not be compelled to return funds without a program audit.[30] St. Charles Parish, the district that had received an audit, raised a number of methodological challenges to it. All four districts claimed that the repayment could be required only for the portions of the programs that were inconsistent with federal regulations. In response, the department admitted that it had never before demanded repayment without a full program audit, but claimed that the criminal investigation sufficed.

The court of appeals agreed that audits were necessary before the repayment could be demanded and held that the repayment could be requested only in an amount to cover the expenditure for ineligible recipients. The court observed that it was the current students in the districts who would suffer from any repayment and cautioned the department to consider the fact that there had been no allegation of bad faith on the part of the school officials and no charge that the programs had been unsuccessful.

A class action suit filed on behalf of Spanish-speaking children enrolled in Illinois schools was heard by a district court in 1985.[31] The plaintiffs charged that the state had violated the Equal Educational Opportunities Act of 1974[32] by failing to develop guidelines for local school districts to use in identifying, placing, and training children for whom English was a second language. Local districts were left to develop their own methods for identifying bilingual education participants, with widely varying results. The district court, without addressing the substance of the complaint, granted a summary judgment in favor of the state defendants, finding that the plaintiffs had failed to assert a claim upon which relief could be granted. The court held that the state enjoyed eleventh amendment immunity, citing the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*.[33]

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30. Tangipahoa Parish School Bd. v. United States Dep't of Educ., 821 F.2d 1022 (5th Cir. 1987).

31. Gomez v. Illinois Bd. of Educ., 614 F. Supp. 342 (N.D. Ill. 1985). *See* The Yearbook of School Law 1986 at 82.

32. 20 U.S.C. § 1703 (f).

33. 465 U.S. 89 (1984).

The Seventh Circuit Court of Appeals concluded that the district court had misread *Pennhurst*.[34] *Pennhurst* would apply if the plaintiffs were seeking to vindicate rights under state law, which is the way the lower court saw the case. The appeals court, however, saw the litigation as arguing that the state had not discharged duties imposed by federal law. In looking at the lower court's decision to dismiss, the appeals court also found that the lower court had failed to view the evidence in the light most favorable to the plaintiffs, as required by federal rules governing summary judgments. As to the standards the lower court should use in rehearing the case, the appeals court suggested the approach taken by the Fifth Circuit[35] that would require the court to review whether local programs were "reasonably calculated" to improve the education of bilingual children. Having found that the plaintiffs had stated a claim that must be reviewed in full lower court proceedings, the case was remanded.

California plaintiffs appealed a lower-court decision that failed to grant a preliminary injunction in a suit brought to stop state rules that determined the eligibility of students for bilingual programs. Finding that the only issue in the case, whether the new rule was in conflict with legislative intent and other statutory provisions, had been fully argued, the state appeals court decided to resolve the question.[36] The challenged rule permitted school districts to return students in a bilingual program to an English-only classroom if the students had been enrolled in the program at least three years, had received English reading instruction in an organized program during the past year, had been recommended for such placement by a language appraisal team, and would be provided with needed instructional support services. Each child's parent or guardian also had to consent to the new placement. A provision of the old rule, that plaintiffs wanted kept, contained an absolute requirement that the student also achieve a certain test score on an English proficiency test.

The plaintiffs argued that the statute, which called for an "objective comparison" of the child's progress, could be satisfied only by retaining the test score requirement. The state replied that the modified requirements for determining the placement would allow districts to consider the totality of a child's progress, and, with parental consent required, contained sufficient protection against arbitrary decisions by local school boards. The appeals court agreed, citing *Lau v. Nichols*[37] as ultimate authority for the proposition that states should seek the reentry of students from bilingual programs to English-only programs whenever

34. Gomez v. Illinois Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987).
35. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
36. Jimenez v. Honig, 233 Cal. Rptr. 817 (Ct. App. 1987).
37. 414 U.S. 563 (1974).

possible. The revised rules, the court held, still met the requirement of "objective assessment," as called for in the California Bilingual-Bicultural Education Act.

PRIVATE AND PAROCHIAL SCHOOLS

Private and parochial school cases are included with the home instruction cases in an earlier section if they involve alleged violations of compulsory attendance law. Private school cases reported in this section traditionally involved transportation, discipline, or tuition contract issues.

A Missouri appeals court in 1987 considered the appropriate tuition payment for a student who was expelled for fighting and for the student's brother, who left the school alleging that he had been harassed by other students.[38] A lower court had required the parents to make a partial payment of the annual tuition, based on the October date when the brothers left the school. The father, however, had signed a contract that contained a clause requiring payment of the full amount if a student was dismissed or withdrew. While the lower court had held that fighting was an insufficient cause for an expulsion, the appeals court reversed, observing that all students at the school had signed a "no-fighting pledge" at the start of the school year. The expulsion penalty was explicitly stated in the pledge. For the appeals court, then, the expulsion was justified, even though the parents were not notified until after it had occurred. The court also held that there was no refund owed for the brother who had been withdrawn voluntarily by the parents.

A New York Hasidic private school, the United Talmudic Academy, and parents of children attending the school, presented a complicated set of issues to a district court in a case that started when female bus drivers sued the public school district where they were employed.[39] The provisions of the bus drivers' contract required assignment of drivers based on seniority. The public school district provided transportation to the children enrolled in the academy under provisions of New York law requiring that transportation "shall be offered equally to all children in like circumstances residing in the district."[40]

When a male driver assigned to the academy bus runs retired, female drivers had the most seniority and were assigned by the school district to transport the students. Male academy students refused to board the buses, reflecting their religious belief that they should not be

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38. Thomas Jefferson School, Inc. v. Kapros, 728 S.W.2d 315 (Mo. Ct. App. 1987).
39. Bollenbach v. Board of Educ. of Monroe-Woodbury, 659 F. Supp. 1450 (S.D.N.Y. 1987).
40. N.Y. Educ. Law § 3635 (1) (Supp. 1986).

exposed to members of the opposite sex. The complex dispute was presented to the court for summary judgment, with the female drivers arguing contract and sex discrimination issues and the academy and parents arguing free exercise and state law issues. Finding that no factual issues were in dispute, the court agreed to decide the case.

The central question from the court's perspective was whether the assignment of only male drivers would violate the establishment clause. The court used *Lemon v. Kurtzman*[41] in its analysis, finding that the second prong of the test used in that case would be violated by the policy. The policy, the court held, would have the "primary effect" of advancing the Hasidic tenet that boys must not come into contact with women. Using language drawn from *Grand Rapids School District v. Ball*,[42] the court concluded that the use of male-only drivers would represent an "impermissible symbolic union" between church and state. The loss of free exercise rights by the academy therefore was justified to prevent the establishment clause violation. The policy was also found to violate the rights of female drivers under title VII of the Civil Rights Act of 1964.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

School search and seizure cases rely heavily on the Supreme Court's decision in *New Jersey v. T.L.O.*[43] The decision established a "reasonableness" test for reviewing school searches, holding that school officials must have a reasonable suspicion that a student has violated the law or school rules. The methods used in the search have to be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[44] A number of 1987 school search cases challenged the efforts of school officials to enforce antidrug statutes or rules, arguing that penalties for violations should be set aside because of improper searches. As in recent years, plaintiffs generally were unsuccessful in advancing such claims.

The Eighth Circuit Court of Appeals considered a case that raised an issue not covered by *T.L.O.* (i.e., the grounds for a search that involved a police liaison officer).[45] The *T.L.O.* opinion contains numerous references to "school searches," causing the appeals court to conclude that special attention was required in looking at a search

41. 403 U.S. 602 (1971).
42. 473 U.S. 373 (1985).
43. 469 U.S. 325 (1985).
44. *Id.* at 336.
45. Cason v. Cook, 810 F.2d 188 (8th Cir. 1987).

involving nonschool personnel. The defendant police officer was assigned to the Des Moines high school as a permanent liaison and wore civilian clothes while working with school officials to maintain order. When several thefts from a gym locker room were reported within a brief period, students seen in the area were questioned. After questioning the students, a search of a student's purse revealed a change purse that had been taken from another student's locker. The liaison officer then conducted a pat-down search of the student found with the coin purse. The officer also was present at the questioning of the students by school officials and presented a card to the two students that ordered them to appear with their parents at a police station. Both students ultimately were suspended from school. A lawsuit then was initiated. A district court granted a directed verdict in favor of the school system, holding that the search was reasonable and that the participation of the officer did not change the search standard from reasonable suspicion to probable cause, as would be required for searches conducted by police officers in most circumstances.

The court of appeals affirmed the lower court, based in part on the fact that school officials were at all times in charge of the investigation. The search by the officer was conducted at their request and was not the product of an official police investigation. The appeals court also concluded that *T.L.O.* requirements had been met. There was strong suspicion that the students were involved in the theft, given their presence in the vicinity, and a pat-down search, given the nature of the offense, also was found to be reasonable. Since the students never were arrested, other claims advanced by the plaintiffs also were dismissed.

Six dollars missing from a classroom aquarium fund led to a search of two fifth-grade students and a lawsuit that reached the Supreme Court of Alabama.[46] The money disappeared from an envelope during a student recess, casting suspicion on two students who remained in the classroom with the envelope while the rest of the class was outside. Upon discovering that the money was gone, students working at the direction of the classroom teacher searched the two students' possessions and desks. A dispute over what occurred next remained unresolved, with one student insisting that she was forced to stand in front of the class and remove her shoes. The teacher, she claimed, then searched her socks for the money. It was never found.

A lower court upheld the validity of the search and the Alabama high court affirmed, holding that there was reasonable suspicion that one of the two students had taken the money. The court also held that the methods used were reasonably related to the purpose of the search.

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46. Wynn v. Board of Educ. of Vestavia Hills, 508 So. 2d 1170 (Ala. 1987).

In dissent, a single justice argued that the humiliation suffered by the child should lead to a finding that the search was excessively intrusive.

An Arizona appeals court considered a case in which a student was seen outside a school near bleachers in an area frequently visited by students who were skipping classes or seeking to avoid detection from other rule violations. The school monitor who observed the student asked the student to empty his pockets, in which was located a bag containing cocaine. The student was committed to the state corrections department following a hearing that he was delinquent. A lawsuit followed, with the plaintiffs arguing that the search was unreasonable.

T.L.O. did not address the question of whether evidence taken in a search could be excluded from consideration in a juvenile proceeding where a search was found to be unreasonable. The Arizona court, without explicitly discussing the issue, held that the monitor had no reason to suspect that the student was engaged in wrongdoing and ordered the evidence suppressed.[47] Other than being in an area where misbehavior sometimes occurred, the student had evidenced no suspicious behavior and had no record of previous school rule infractions.

Two district court decisions addressing the drug and alcohol testing policy in the Arkadelphia, Arkansas schools were decided in 1985 and finally were published in 1987. The school district policy that gave rise to the lawsuit contained a number of provisions that were subjected to lengthy analysis by the court. Under the policy, students could be subjected to one or all of several tests, including blood, breath, urine, and polygraph testing. A trace of illegal drugs constituted a violation of school rules and for a first-offense violation the student was given a chance to withdraw for the remainder of the semester, with loss of grades. If the student refused to withdraw, he would be expelled for the semester.

Three students who were in a restroom where marijuana had been smoked testified that they were told they were required to take the test. All three were forced to provide urine samples that were given in the presence of a school official. One of the three tested positive and withdrew. In a second incident, a student recorded .06 on a breathalyzer test, administrated when school authorities smelled alcohol on his breath. He too withdrew, and a scuffle with the principal added a second semester of suspension to his penalty.

While the plaintiffs' arguments included a variety of procedural and factual disputes, of greatest interest is the court's discussion of the drug policy. In the case of the urinalysis, the court concluded that the students had "agreed" to take the tests only because they thought they had to and that such consent was neither free nor voluntary.[48] The test itself, the

47. *In re* Pima County Juvenile Action, 733 P.2d 316 (Ariz. Ct. App. 1987).
48. Anable v. Ford, 653 F. Supp. 22, 39 (W.D. Ark. 1985).

court decided, contained such a high level of false positives and false negatives that it was not reliable. In addition, positives could be related to nonschool consumption. On this point the court concluded, using *T.L.O.* language, that the test was not "reasonably related" to maintaining order in school.

For the plaintiff who had been drinking, the court found that the student and his mother had consented to the breathalyzer test and that its reliability was well established. The student's suspension therefore was upheld. The plaintiff subjected to the urinalysis was awarded one dollar for the due process violation and $500 as compensatory damages. Further use of the test was also enjoined.

In a subsequent opinion the district court considered the question of the retention of urinalysis results in student records and clarified its first opinion.[49] The court declared that the urinalysis testing violated the first and fourteenth amendments and that the use of test results also violated those amendments. No record of the tests could be maintained in student files. Observing that the defendants wished to continue urine testing, the court indicated that it felt that school officials had adequate notice after its second opinion that they did so "at their peril." After discussing the urine tests in light of several precedents,[50] the court held that the "seminude body fluid search" made the defendants both officially and individually liable for damages.

First Amendment Religious Rights

The curriculum of the public schools continued to be the object of first amendment battles in 1987. At issue were claims that "balanced" treatment of such subjects as evolution required the presentation of religious themes and responses and that the inclusion of religious perspectives violated the establishment clause. Plaintiffs also continued to argue that their religious freedom was violated by the inclusion of certain topics in the curriculum, or that certain books violated the establishment clause. It was argued that the books should be removed or that students should be permitted to skip classes where offensive materials were taught.

The United States Supreme Court heard a challenge to Louisiana's Balanced Treatment for Creation-Science and Evolution-Science Act. The Act required that the theory of evolution be paired with "creation

49. Anable v. Ford, 663 F. Supp. 149 (W.D. Ark. 1985).

50. Wood v. Strickland, 420 U.S. 308 (1975) (school officials may be liable for denying the constitutional rights of students); Schmerber v. California, 384 U.S. 757 (1966) (higher standards for searches of body cavities or of bodily fluids); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (liability for nude search of a student following sniff dog alert in random drug search).

science" whenever either was taught in the public schools. A district court had issued an injunction against the implementation of the Act, holding that it had no secular purpose, thereby failing the first *Lemon* test, and the court of appeals agreed.[51] Attempts to have the appeals decision reconsidered also failed[52] and the ruling that creation science advanced religious doctrine was before the Supreme Court.

Cases deciding that a state statute has no secular purpose are relatively rare,[53] requiring a court to find that a legislature acted to promote religion. The two other tests suggested by *Lemon*, that the law must neither advance nor inhibit religion and not lead to excessive government entanglement with religion, are more commonly the source of first amendment violations. In this case, however, the Supreme Court majority upheld the district court ruling that the law had no secular purpose.[54] In addition to the five-person majority opinion, Justices Powell and O'Connor filed a concurring opinion, Justice White concurred in the result and the Chief Justice and Justice Scalia dissented.

The Court majority looked at the legislative history of the Act and found that the purpose of its sponsor was to "narrow" the science curriculum. This violated the academic freedom of those who might decline to teach creation science. In addition, the Act gave "preference to those religious groups that have as one of their tenets the creation of humankind by a divine creator."[55] This was seen as advancing religion, rather than as furthering a secular purpose, such as making the science curriculum more effective. Justice Powell's concurring opinion expanded this argument, focusing on the origins of creation science, finding that the sources of creation science were institutions that were concerned that our nation had drifted too far from its belief in an "omnipotent Creator."

In dissent, Justice Scalia argued that the issue had never been fully heard by the district court and that state courts had not had a chance to interpret the statute. He also concluded, after a lengthy review of legislative history, that it was erroneous to conclude that legislators acted exclusively for religious purposes. Describing the determination of legislative intent as "a perilous enterprise," the dissentors ended with an attack on *Lemon* and its use in establishment clause cases.

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51. Aguillard v. Treen, 634 F. Supp. 426 (E.D. La. 1985), *aff'd sub nom.*, Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985). See The Yearbook of School Law 1986 at 99.

52. Aguillard v. Edwards, 778 F.2d 225 (5th Cir. 1985).

53. Epperson v. Arkansas, 393 U.S. 97 (1968) (statute forbidding the teaching of evolution); Stone v. Graham, 449 U.S. 39 (1980) (statute requiring posting of Ten Commandments on classroom walls); Wallace v. Jaffree, 472 U.S. 38 (1985) (statute authorizing moment of silence for prayer).

54. Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

55. *Id.* at 2582.

In a case attracting wide attention, a Tennessee district court ruled in 1986 that parents could remove their children from elementary school reading classes when materials from the Holt, Rinehart, and Winston basic reading series were being employed.[56] The parents argued that the series espoused, among other things, "feminist, humorist, vegetarian, or one-world government views" that offended the teachings of their religion. The plaintiffs belonged to no organized sect but all considered themselves to be born-again Christians. In addition to allowing children to "opt out" of reading classes, the district court awarded the plaintiffs over $51,000 in damages.

The Sixth Circuit Court of Appeals reversed, concluding that "exposure" to diverse ideas does not constitute the teaching or promotion of a particular religious or philosophical perspective.[57] The appeals court found that the lower court had erroneously concluded that objecting parties were required to take some action that offended their religious beliefs. In the case at hand, the court found that no action was urged on the children. The court quoted Justice Jackson's concurring opinion in *McCollum v. Board of Education*, "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds."[58] The appeals court found no free exercise violation and reversed the awarding of damages. In two concurring opinions, one circuit judge argued that even if there had been a free exercise violation, there was a compelling state interest to justify it. The third judge went still further, arguing that school boards could establish any curriculum no matter how one-sided, so long as it did not violate the establishment clause.

The seemingly endless line of Alabama prayer cases, arising out of state laws, continued in 1987. In 1983 the district court adopted the position, later reversed, that the first amendment had never been incorporated by the fourteenth amendment to the actions of a state.[59] Following a series of appeals, the Supreme Court struck down a part of the Alabama law that called for "mediation or prayer" at the start of the school day,[60] but denied certiorari with regard to nonstatutory school prayer practices.[61] This left those issues to be argued in the district court. After a lengthy 1986 bench trial, the district court found that forty-four

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56. Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986). *See* The Yearbook of School Law 1987 at 91-2.

57. Mozert v. Hawkins County Pub. Schools, 827 F.2d 1058 (6th Cir. 1987).

58. 333 U.S. 203, 235 (1948).

59. Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd in part sub nom.*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

60. Wallace v. Jaffree, 472 U.S. 38 (1985).

61. Board of School Comm'rs of Mobile County v. Jaffree, 466 U.S. 926 (1984).

textbooks on the Alabama approved textbook list violated the establishment clause by unconstitutionally establishing the religion of secular humanism.[62] The texts, in the opinion of the court, failed to treat religion fully by not incorporating religious themes into the history, economics, and other texts that were removed by the court from the list.

On appeal, the Eleventh Circuit Court of Appeals again reversed the district court.[63] The appeals court found that the textbooks conveyed no message of endorsement of secular humanism or any religion. Citing *McCollum*, the appeals court concluded that neutrality on religious matters could not be equated with hostility toward religion. There is nothing that prevents Alabama teachers from including religious themes in classes, the court reasoned, and no reason to violate the establishment clause by requiring them to speak about the subject. The appeals court ordered the district court to terminate the litigation.

Prayers offered at school commencement ceremonies are the subject of litigation that finds its way into this chapter each year, with mixed results. District courts have used the *Lemon* test to conclude that such prayers neither advance nor inhibit religion, while other courts have held that they impermissibly advance religious themes. A Michigan district court found in 1985 that a graduation invocation and benediction met all three parts of the *Lemon* test and the case was appealed to the Sixth Circuit Court of Appeals, which reversed the decision.[64] Both prayers in dispute, arising from two school districts, were Christian offerings that invoked the name of the Heavenly Father or Christ our Lord.

In analyzing the prayers, the appeals court looked at *Marsh v. Chambers*,[65] which held that the "history and tradition" of the country permitted "nonproselytizing" invocations of the sort used to open legislative and judicial sessions without offending the first amendment. Using the standard for ceremonial prayer developed in *Marsh*, the appeals court majority held that the commencement prayers were not, in fact, "civil" invocations or benedictions. The Christian prayers, the majority concluded, failed the test of neutrality established in *Marsh*. In dissent, one judge resisted the majority's analysis that the content of prayers should be subjected to scrutiny, arguing instead that the short prayers were insufficiently long or important enough to offend the first amendment.

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62. Smith v. Board of School Comm'rs of Mobile County, 655 F. Supp. 939 (S.D. Ala. 1987).

63. Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

64. Stein v. Plainwell Community Schools, 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

65. 463 U.S. 783 (1983).

State laws requiring the inoculation of children before commencing school attendance sometimes contain exemptions for religious sects that oppose inoculations on religious grounds. New York's law contains an exemption for members "of a recognized religious organization." The statute was challenged by parents who claimed that they had a personal religious objection and that the statute's "recognized" group requirement violated their first amendment rights and their right to equal protection under the fourteenth amendment.[66] A district court rejected state arguments regarding the plaintiff's standing and examined the constitutionality of the group requirement, finding that "no lengthy citation or analysis" was necessary to conclude that the policy violated the first amendment.

The court went on to hold that there was a less restrictive way for the state to assert its interest in having children inoculated, such as granting exemptions to those individuals with "religious" objections after the term was defined by state rules.[67] In looking at the plaintiffs in the case, however, the court found that the objections of one plaintiff plainly were "religious" and the objections of the other were not. The court found that the second plaintiff had gone to some length to disguise his views, including the purchase of membership in a mail order church, but that his views on inoculation were not "religiously inspired." Relief was granted to one of the plaintiffs and a discussion of fees and damages was put off until the parties had the opportunity to pursue the claim.

A Pennsylvania school board rejected a request from a subsidiary of the Campus Crusade for Christ to rent a high school auditorium for a weekend magic show that contained a fifteen-minute evangelical message. The board relied on its policy of not renting school facilities for religious services, instruction, or activities. The auditorium had, however, been rented to a wide variety of groups during nonschool hours. Plaintiffs in the case argued that the failure of the district to rent them the hall violated their first amendment speech and assembly rights and that the school had created an "open forum" by renting to other groups.[68] The district court agreed and granted an injunction to the plaintiffs, holding that the school clearly had established an open forum and that the defendant's claim that the establishment clause would be violated by the rental was unfounded, considering the time and day of the program.

A Texas district court reached the opposite conclusion in a case of a

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66. Sherr v. Northport-East Northport Union Free School Dist., 672 F. Supp. 81 (E.D.N.Y. 1987).

67. *See* Sherbert v. Varner, 374 U.S. 398 (1963) for a discussion of less restrictive alternatives in free exercise cases.

68. Gregoire v. Centennial School Dist., 674 F. Supp. 172 (E.D. Pa. 1987).

different sort that involved student prayer and evangelical recruiting, sometimes using bullhorns, in the corridors of a high school before and after school.[69] Plaintiffs in the case claimed they were "called by God" to preach and rejected off-campus locations for their services. The court held that in-school religious proselytizing violated the establishment clause, carrying the message that the school endorsed the content of the program. Using *Lemon*, the court held that both the second and third tests would not be met if the school permitted the activity to continue.

The Supreme Court ruled in 1985 that community education and shared time programs held in space leased from religious schools violated the establishment clause.[70] Following a denial of fees by the district court, based on a finding that the plaintiff's action was not brought under section 1983, or any other civil rights statute listed in section 1988 of the 1976 Civil Rights Attorney's Fees Act,[71] the case was back before the Sixth Circuit Court of Appeals.[72] The plaintiffs agreed that they filed their case seeking a declaratory judgment without making reference to section 1988, but argued that it would have been redundant to employ parallel citations. The appeals court could find no case "exactly like the present one," but concluded that other fee cases had made awards when the "substance" of the case involved a section 1983 claim, even if the court decided the case on other grounds.[73] In dissent, one judge argued that the plaintiffs were seeking to make an "after-the-fact conversion" of their action into a section 1983 claim and that the cases cast doubt on the majority's reasoning in the case. The district court now will establish reasonable fees.

First Amendment Freedom of Expression

Expression cases reflect the tension between individual student rights and the power of school personnel to determine the structure of the school environment. Cases in recent years have focused on attempts by students or others to have certain places within the school declared to be public or limited public forums, following the definitions established in *Perry Education Association v. Perry Local Educators' Association*.[74] The Supreme Court's ruling in *Cornelius v. NAACP Legal Defense and Education Fund*[75] that exclusion of groups from a public forum can

69. Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987).

70. School Dist. of the City of Grand Rapids v. Ball, 473 U.S. 373 (1987). *See* The Yearbook of School Law 1986 at 94-5.

71. 42 U.S.C. §§ 1983, 1988.

72. Americans United for Separation of Church and State v. School Dist. of the City of Grand Rapids, 835 F.2d 627 (6th Cir. 1987).

73. *See, e.g.*, Maher v. Gagne, 448 U.S. 122 (1980).

74. 460 U.S. 37 (1983).

75. 473 U.S. 788 (1985).

occur only with a showing of compelling state interest also is cited by plaintiffs seeking to establish or expand expression rights.

Grist for the further arguments in these cases was provided by Congress in 1984 with the passage of the Federal Equal Access Act.[76] The Act requires schools receiving federal funds and having a limited open forum to make space available to students for meetings without exercising content regulation. The Act was intended to permit student-led and -sponsored religious groups to meet during activity periods but its principal effect in litigation has been on the use of school facilities for antiwar and other secular activities.

All of these precedents were used by "peace activists" who sought to use school bulletin boards and guidance offices for literature distribution and to appear at school "career days" to respond to military recruiters. A district court granted summary judgment to the plaintiffs, concluding that a limited public forum had been created in the Atlanta public schools.[77] On appeal, the Eleventh Circuit Court of Appeals upheld the district court result, but on different grounds.[78] The appeals court found that the lower court had prematurely decided the forum issue, holding that factual questions on the issue remained.

The appeals court, however, held that the school's refusal would not pass muster even if the schools had created only a nonpublic forum. Citing *Cornelius*, the court observed that nonpublic forum controls were permissible only if the distinctions drawn were reasonable in light of the purpose of the event and were viewpoint neutral. The appeals court could find no reason for the exclusion under this test and upheld the injunction issued by the lower court on this more limited ground.

After several years of relative inactivity in appeals involving school newspapers, three cases were decided in 1987, each presenting an interesting fact situation. In the first, a Pennsylvania seventh-grade student who testified he was called "to lead people to the Lord" filed suit when school officials sought to limit his distribution of a religious newspaper.[79] The newspaper was produced in Illinois by a group known as "Student Action for Christ." The plaintiffs resisted attempts by the school to force them to distribute the paper on the sidewalk outside the school and litigation commenced when the student received in-school suspensions for persistently ignoring his principal's instructions to stop the distribution.

The district court rejected the plaintiffs' assertion that the corridors

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76. 20 U.S.C.A. § 4071 *et seq* (Supp. 1985).

77. Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986). *See* The Yearbook of School Law 1987 at 96.

78. Searcey v. Crim, 815 F.2d 1389 (11th Cir. 1987).

79. Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987).

of the school were a limited open forum, under the terms of the Equal Access Act. The court found that the purpose of the Act was to regulate "meetings" and that the gathering of students in hallways was not a meeting under the terms of the Act. The court did find, however, that the school had created a limited public forum during its end-of-the-day activity period. Student clubs met at that time for generally unsupervised activities. While it was not precisely the relief sought by the plaintiffs, the court concluded that the disputed paper could be distributed and discussed in the activity setting. Holding that it was reasonable for schools to exercise time and place restrictions on the distribution, the activity period represented a part of the day already established for student-initiated activities. On reaching this conclusion, the court argued that the 1984 Equal Access Act had the effect of overturning a 1983 Third Circuit decision which held that religious activities in activity periods were not permitted by the establishment clause.[80]

In the early 1970s, a series of federal courts of appeal decisions upheld the right of school principals to exercise prior restraint on the content of student newspapers, including those produced off campus, so long as reasonable standards were employed and an appeals process was present to contest unfavorable decisions. The Eighth Circuit Court of Appeals again confronted the question of prior restraint in a case originating in Fridley, Minnesota.[81] Students distributed an underground newspaper, *Tour de Farce*, and both sides then sought a summary judgment in district court after school officials asserted the school's written policy requiring prior review. The court granted a summary judgment upholding the policy and the plaintiffs appealed.

It was not alleged by the school that harm had come to any party as the result of *Tour de Farce*, and no student was punished, so the issue before the appeals court was solely the school's written policy involving prior review and restraint. The Eighth Circuit had previously ruled that prior restraint, in a case involving a school-sponsored newspaper, was not, *per se*, unconstitutional and the current court found it was bound by that decision.[82] The appeals court also concluded, by a 2-1 vote, that the specific written policy used by the system was not overbroad, except for a section that had been deleted by the district court.

Both the two-person majority and the dissenting judge focused on the standard in *Tinker v. Des Moines Independent Community School*

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80. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986). The case was vacated for lack of standing to appeal. *See* The Yearbook of School Law 1987 at 90-1.

81. Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987).

82. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987). *See* The Yearbook of School Law 1987 at 96-7.

District,[83] which holds that schools must be able to forecast disruption before a student's first amendment rights can be limited. The majority cautioned the defendants that criticism, "even in vigorous or abrasive terms," did not necessarily cause the level of disruption that would permit suppression of speech. They held, however, that the written policy developed by the district was adequate, while cautioning that the use of the policy would determine whether constitutional rights had been violated. The dissenting judge argued that the policy was overly vague and would inevitably lead to a denial of first amendment rights if it were applied.

Prior restraint also was the issue in a 1987 Washington State case when students received a letter of reprimand for distributing a paper on school grounds at a senior class barbecue.[84] The paper, *Bad Astra*, contained criticisms of teachers so severe that it was reported that several teachers found it "emotionally difficult" to continue teaching during the half day of classes that remained. The students were disciplined for failing to submit *Bad Astra* to the principal and for using pseudonyms to write the paper. Identities were easy to determine, however, because the mother of one of the students, who also was the head of the high school P.T.A., distributed copies to all faculty by placing them in teacher mailboxes.

The district court examined both the old policy on newspapers that was in force on the day of the occurrence and a new policy that was enacted later by the school board. Portions of the new policy were found to be overly vague. As to the *Bad Astra* distribution, the court held that prior restraint was justified to avoid disruption and to give students a chance to modify content to avoid damaging others. The old policy had an adequate appeals process and the court found it unnecessary to review some of the content criteria of the old policy since it had been replaced and since they were unrelated to the litigation at hand. In view of the cooperation by the plaintiffs in developing the new policy, the court invited the defendants to consider removing the disciplinary letters from the students' files.

A teacher who was dismissed as the advisor of the school newspaper filed suit alleging that the principal's action violated his own and his students' first amendment rights.[85] The teacher was dismissed after the paper ran an article critical of the federal Martin Luther King, Jr. holiday. While the advisor did not agree with the content of the article, he had assisted the student in improving the quality of the piece and allowed it to be published. The principal acted because she felt that the

83. 393 U.S. 503 (1969).
84. Burch v. Barker, 651 F. Supp. 1149 (W.D. Wash. 1987).
85. Romano v. Harrington, 664 F. Supp. 675 (E.D.N.Y. 1987).

teacher should have been more sensitive to the impact the article might have on minority students in the school.

The case involved both contract rights and first amendment issues. The district court refused to see the teacher's work on the newspaper as a curriculum matter, finding that the teacher's first amendment rights had not been violated. But the court went on to hold that the teacher had third party standing to seek relief on behalf of students, whose first amendment rights were implicated by the firing. Students who were fearful that their advisor might be fired if they wrote a controversial piece would suffer a loss of their freedom of expression. The court refused to grant summary judgment on the contract question, holding that the record was not complete on the question of the teacher's possible loss of property rights or on the need for procedural protection in the teacher's dismissal from extracurricular assignments.

A satirical tee shirt that caricatured the principal and two other administrators received unsatisfactory reviews from those appearing on the shirt. The shirt showed the administrators in a state of intoxication, holding aloft a variety of alcoholic beverages. The creator of the shirt was suspended for two days and filed suit when administrators refused to allow him to remain in school when he arrived wearing one for morning classes.[86] Both sides in the case filed for injunctive relief.

The court's analysis focused on the message that was conveyed by the shirt, finding that the record indicated no intent to communicate a political message. The court did find, however, that the shirt falsely communicated the message that administrators drank excessively. This, the court reasoned, would interfere with their ability to serve as role models. The defendant's request for an injunction therefore was granted and the student's first amendment claims were dismissed.

The final case to be discussed is certain to be included in future presentations by school law experts as proof that very unusual issues can be the subject of free expression claims. The suit resulted when a school principal refused to let two students dressed in clothing of the opposite sex attend their junior-senior prom.[87] The students, who were brother and sister, claimed unsuccessfully that the school's dress code violated their first and fourteenth amendment equal protection rights. The equal protection argument was especially interesting, with the brother claiming that his high heels, earrings, stockings, dress, and fur cape were identical to those worn by female students who were allowed to attend the event. The court dismissed this and other claims, granting summary judgment to the defendants.

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86. Gano v. School Dist. No. 411 of Twin Falls, 674 F. Supp. 796 (D. Idaho 1987).
87. Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353 (S.D. Ohio 1987).

SANCTIONS FOR STUDENT MISCONDUCT

Suspensions and Expulsions

Goss v. Lopez[88] requires school administrators to provide students with information about the offense they are alleged to have committed so that a student can tell his side of the story before being suspended. In cases where the suspension is greater than ten days in duration, more due process is required. Since the 1975 *Goss* decision, courts traditionally have declined to read the case as requiring elaborate due process, except where expulsion from school is the penalty. Not all short-term school suspensions have the same effect, however. A short-term suspension, for example, may occur immediately before an examination period, causing students to fail courses. The *Goss* court did not consider the questions of disproportionate suspension impact, though it was argued in several of the cases that follow.

An Illinois student who consumed a cocktail at a senior class outing was suspended for the remaining three days of the school year. He missed his final exams and failed three classes, resulting in his inability to graduate from high school. Another student who was suspended for the same offense also missed his exams but had sufficient accumulated credits to graduate. The court found that both students had received an adequate hearing before the school board.[89] The court refused to hold, however, that the "long-term effect" of the suspension for the student who failed made it the equivalent of an expulsion, thereby triggering additional due process requirements. On the plaintiff's equal protection claim, the court ruled that the differences between the treatment of the two students flowed from their different grade point averages, rather than a violation of the equal protection clause. Finally, the court observed that it was not the role of the federal courts to question the "wisdom or compassion" of a particular administrative decision.

A student who attended a school dance while intoxicated was expelled and appealed to an Alabama court.[90] He argued that an intoxicated friend who also was arrested by police at the dance was not expelled. The student claimed the failure of the school to assign similar penalties for the same offense violated the equal protection clause. The Alabama appeals court disagreed, holding that the school board had considered the strength of the evidence regarding the intoxication of the other student, finding the evidence less compelling than that confronting the plaintiff.

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88. 419 U.S. 365 (1975).

89. Lamb v. Panhandle Community Unit School Dist. No. 2, 826 F.2d 526 (7th Cir. 1987).

90. Carroll v. City of Dothan Bd. of Educ., 510 So. 2d 246 (Ala. Civ. App. 1987).

In an Arkansas case, the state supreme court heard an appeal from a school district that had expelled a student for "taking delivery" of drugs in a school restroom.[91] The pills were over-the-counter diet aids and all parties in the case knew at the time that the drugs were not prohibited substances. A lower court decision ordered the student readmitted to school and she graduated. In reviewing the case, the Arkansas high court noted that no laboratory analysis had ever been conducted to determine the content of the pills. Even if they were diet aids, the court concluded that an expulsion rule for bringing such pills to school could be established by the board.

A student who was suspended for the balance of a semester for selling marijuana in school filed suit in federal court, claiming that he had received inadequate notice of the charges and that his attorney had not been able to cross-examine the principal in his hearing before the school board.[92] The court found that the four opportunities afforded the student at various times to discuss the charges represented adequate notice. On the request to cross-examine, the court held that there was no such right in a student suspension proceeding.

Student field trips offer a fertile ground for misconduct cases that appear in this section. In one such case, a trip to Hawaii for a band competition led to a hotel room altercation between students and their principal. The principal found out that female students had been using an unoccupied room adjacent to their own and a boy was seen on the balcony next to the unoccupied room. The principal ordered the girls to pack for a return flight to Tennessee. Alcohol was then found in the refrigerator of the unoccupied room. This enraged the principal, who broke down the door to the bathroom where one of the girls was located and slapped the student. The four students were taken to the airport with standby tickets and inadequate money for meals. They spent twenty-four hours at the airport and eventually returned home twelve hours later.

A lawsuit resulted, with a district court granting the defendant's motion to dismiss all state law issues. On appeal, the Sixth Circuit Court of Appeals held that a search of the students' possessions was reasonable, using *T.L.O.* analysis.[93] But the search did not occur in school, causing the court to apply the seldom-used *in loco parentis* doctrine, after considering the nature of the field trip and the role of chaperones on such trips. The suspension of the plaintiff for seven days also was upheld. But the alleged assault, the appeals court held, was not appropriately dismissed by summary judgment. The need for the principal to

91. Springdale Bd. of Educ. v. Bowman, 740 S.W.2d 909 (Ark. 1987).
92. Newsome v. Batavia Local School Dist., 656 F. Supp. 147 (S.D. Ohio 1986).
93. Webb v. McCullough, 828 F.2d 1151 (6th Cir.

strike the student "was so minimal or nonexistent that the alleged blows were a brutal and inhumane abuse of . . . official power, literally shocking to the conscience."[94] The issue was remanded to the district court for further hearings.

A Pennsylvania student was suspended from school when he succeeded in entering the school's main computer from his home computer. The thirty-day suspension was overturned by a lower court on the ground that the school board's attorney served as prosecutor in the case and then advised the board on how to decide it when deliberating in closed session. The school district appealed.[95] In looking at the case, the state appeals court framed the issue in terms of the *Goss* decision and state cases, holding that the attorney's role was inappropriate but that the flawed use of the attorney did not represent a "purposeful" disregard of the student's rights. The case therefore was remanded to the school board with an order to change the attorney's role and to rehear the case.

A Florida student was "transferred" from his high school for a major infraction of school rules. The plaintiff was sent to a separate facility designed for students with behavior problems for a minimum of ten days. Florida law, however, requires parent notification and participation in suspension cases. The school district failed in its attempt to convince an appeals court that the transfer was not a suspension and the court ordered the suspension dismissed for failure to notify the parents.[96]

Juvenile proceedings and school suspension or expulsion proceedings sometimes become mixed, with the requirements of one system conflicting with the other. Such was the case in North Carolina, where a student had been suspended for the balance of the school year for physically assaulting another student. At the same time, the student was adjudged a delinquent by a juvenile court, and the judge required the student to be provided with "some type of public school situation." The school board appealed.[97] In resolving the conflict, the appeals court held that lawfully suspended or expelled students could not be ordered back to school in juvenile proceedings, unless the school consented to the student's readmittance. The court reached its decision reluctantly, expressing at some length its preference for some educational placement for juvenile offenders as an alternative to leaving them "free to roam at will."

Finally, in a most unusual case, a Pennsylvania appeals court heard an appeal from a student who admitted to possession of marijuana on a school field trip to an amusement park.[98] As required by state law,

94. *Id.* at 1159.
95. Pittsburgh Bd. of Pub. Educ. v. M.J.N., 524 A.2d 1385 (Pa. Commw. Ct. 1987).
96. W.A.N. v. School Bd. of Polk County, 504 So. 2d 529 (Fla. Dist. Ct. App. 1987).
97. *In re* Jackson, 352 S.E.2d 449 (N.C. Ct. App. 1987).
98. Keeler v. Everett Area School Dist., 533 A.2d 836 (Pa. Commw. Ct. 1987).

notice of the student's suspension was sent to the secretary of the school board. The plaintiff sued the principal who sent the letter for defamation of character and intentional infliction of emotional distress. It took only a few paragraphs for the court to dispose of the appeal, finding it had "no merit" and that defamation is not possible in cases where no false information is supplied and where the notice is required by law to be sent.

Corporal Punishment

Corporal punishment cases in recent years have consisted entirely of state litigation with no serious constitutional claims at issue. In contrast, two 1987 circuit courts of appeal decisions addressed major constitutional challenges. The Supreme Court's 1977 decision in *Ingraham v. Wright*[99] is generally remembered for its holdings that no hearing is required before the administration of corporal punishment, that corporal punishment is not a cruel and unusual punishment prohibited by the eighth amendment, and that excessive corporal punishment should be an issue addressed in state courts through criminal or civil action. *Ingraham* did not address squarely the question of whether excessive corporal punishment might violate a student's substantive due process rights. Two circuit courts of appeal decisions are in conflict on the question, one ruling that there could be a substantive due process violation[100] and one ruling the opposite.[101] Another circuit court also ruled that excessive punishment of a handicapped student could be a substantive due process violation.[102]

The Tenth Circuit Court of Appeals confronted the question of corporal punishment substantive due process in a case that originated in New Mexico.[103] The parents of a nine-year-old elementary school student went to federal court following two corporal punishment incidents. In the first, a teacher held the girl by her ankles while the principal struck her legs with a paddle that was split down the middle. The paddle left a two-inch scar on the child's leg. In the second episode, the child was held bent across a desk while her buttocks were paddled. A school nurse testified that the bruises were so severe that she would have called the police to report a case of child abuse, had the child come to school in that condition.

The district court granted summary judgment to the defendants,

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99. 430 U.S. 651 (1977).

100. Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

101. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976).

102. Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

103. Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

holding that they enjoyed qualified immunity for the beatings. The court of appeals reversed and ordered the district court to hear the case. The appeals court viewed *Ingraham* as requiring, "at some point," that excessive corporal punishment violates the pupils' substantive due process rights. The appeals court used a Supreme Court criminal search case[104] as justification to conclude that official conduct that "shocks the conscience" can violate substantive due process rights. The court went on to create three categories of corporal punishment—those that are reasonable and not actionable; those that exceed the common law standard without adequate state remedies, violating due process rights; and those that are shocking to the conscience that violate substantive due process rights. While the plaintiff's claims may "not survive the crucible of the trial," the chance to secure relief was ordered.

A qualified immunity defense raised by school officials was rejected in a case before the Fifth Circuit Court of Appeals.[105] The case presents another shocking fact situation, this one involving an eight-year-old student who was tied to a chair with a jump rope for a day and part of another. The student was freed for lunch but was not allowed to use the bathroom during her confinement. The teacher did not argue that the procedure was a punishment but instead that it was an "instructional technique." The appeals court held that *Ingraham* did not apply as cited by the defendants, since they had already claimed that the teacher's action was not a punishment. The court also added that the principal and teacher were not entitled to immunity, the only issue appealed in the case. The court held they should have known that tying a student to a chair for nearly two days would clearly deny the student's constitutional or statutory rights.

A Tennessee district court considered the use of a "time-out box" to confine students in a sixth-grade classroom.[106] The box was a refrigerator carton, with an open top and front, into which a desk had been placed. The student could see the teacher but not other students in the class. The student left the box to use the bathroom, eat lunch, and attend reading classes. No issues involving special education were present since the student had not been identified as handicapped. The student was in the box for six days, however, and his parents filed suit on a wide variety of procedural and substantive grounds.

The district court could find no support for the plaintiff's suggestions that *Ingraham* or *Goss* applied to the case, since there was no suspension or corporal punishment. In fact, the court found that the student could participate fully in the class and that this was preferable to disciplinary

104. Rochin v. California, 342 U.S. 165 (1952).
105. Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303 (5th Cir. 1987).
106. Dickens v. Johnson County Bd. of Educ., 661 F. Supp. 155 (E.D. Tenn. 1987).

exclusion. The court also refused to find that the eighth amendment had been violated, concluding that the only harm experienced by the student was that he could not see his classmates. "While prolonged, uninterrupted confinement to a 'timeout' area might give rise to a constitutional claim, plaintiff's punishment was not unduly harsh . . . ."[107] The court granted the defendants' motion for summary judgment.

DESEGREGATION

Court supervision of desegregation continued unabated in several jurisdictions, most notably in Denver, St. Louis, and Kansas City (Missouri). Elsewhere, however, long-standing cases appeared near termination. Arguments also continued in 1987 cases regarding the attainment of unitary status. That status ends district court supervision of local desegregation issues and returns control of the matter to the local school board. It proved difficult, however, for districts to win a declaration of unitary status from federal courts in 1987. On the other hand, new plaintiffs were rebuffed in several attempts to reopen cases in districts where unitary status had been declared.

Systemwide Remedies

Once a school district has been declared "unitary" with regard to school desegregation, the burden is on the plaintiffs to show that the school system has become resegregated through official action. In other words, the burden of proof is the same as that which is required in new cases. Three 1987 cases involved attempts by plaintiffs to reopen long-dormant cases by alleging new systemwide segregation. All three attempts met with failure.

Austin, Texas plaintiffs failed to convince a federal district court that a case closed four years ago should be reopened and failed to show that current school segregation was the result of purposeful action. The Fifth Circuit Court of Appeals affirmed the district court ruling in both areas.[108] The plaintiffs buttressed their case on a Tenth Circuit case[109] that held that even unitary districts could be subjected to continuing litigation, if the new action involved a previous injunction issued in the case. Following the Tenth Circuit reasoning, the burden was still on the defendants to show that no changes in the injunction were needed.

The Fourth Circuit, in the same year, reached an opposite con-

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107. *Id.* at 159.

108. United States v. Texas Educ. Agency, 671 F. Supp. 484 (W.D. Tex. 1987), *aff'd sub nom.*, United States v. Overton, 834 F.2d 1171 (5th Cir. 1987).

109. Dowell v. School Bd. of Okla. City, 795 F.2d 1516 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 426 (1986).

clusion[110] to that of the Tenth. In the case under discussion, the Fifth Circuit agreed with the Fourth. The Fifth Circuit observed that the problem with the Tenth Circuit approach was that it "denies meaning to unitariness by failing ever to end judicial superintendence of the schools."[111]

The plaintiffs in the Austin case were objecting to a plan by the system to end most elementary busing, with the effect that sixteen of sixty-five elementary schools would become racially identifiable. The Fifth Circuit held that the plan's adoption was based on such factors as long bus routes, overcrowding, and new state education requirements. Also at issue was the timing of the suit, which sought an injunction twelve days from the start of the school year. In affirming the lower court, the appeals court held that no discriminatory intent had been proven and that there was little likelihood that the plaintiffs would prevail if the injunction were granted.

An Arkansas district court reacted in 1985 to a case with facts more common to desegregation cases of twenty years earlier by ordering the development of a desegregation plan.[112] Plaintiffs in the case offered evidence that the school board election system discriminated against blacks, that racial slurs were commonplace in the schools, that blacks were denied the use of school facilities, and that black teachers were dismissed without regard to seniority when an all-black school was closed. Following the issuance of the order to develop a desegregation plan, the defendants appealed. The Eighth Circuit Court of Appeals dismissed the appeal as premature, holding that an order to develop a "legal plan" was not a reviewable injunction.[113]

Attempts to find new school segregation in Topeka, Kansas were rejected by a district court.[114] In finding that any current segregation, if it exists, was "not the result of past or present intentional segregative conduct" the court first conducted an exhaustive review of school practices. Included in the court's review were the minority composition of schools, transfer policies, new construction, boundary decisions, and other factors. Test scores of students and even a community attitude survey, asking questions about the public's perception of the racial identity of schools, were reviewed by the court. The court ultimately concluded that the plaintiffs were arguing for "judicial fine-tuning" in a

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110. Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 420 (1986). *See* The Yearbook of School Law 1987 at 110-2.

111. United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987).

112. Sherpell v. Humnoke School Dist. No. 5, 619 F. Supp. 670 (E.D. Ark. 1985). *See* The Yearbook of School Law 1986 at 112.

113. Sherpell v. Humnoke School Dist. No. 5, 814 F.2d 538 (8th Cir. 1987).

114. Brown v. Board of Educ. of Topeka, 671 F. Supp. 1290 (D. Kan. 1987).

system that all evidence suggested already was functioning effectively. The court declared the system unitary.

Cross-district Remedies

Cases in this section invariably are of long standing and involve several local jurisdictions, and sometimes states, in remedying past segregation. The issue of who must pay to remedy past discrimination is frequently litigated. These cases also require courts to determine proportionate responsibility for violations as a predecessor to assessing compliance obligation.

Litigation surrounding desegregation plans in St. Louis set a record of sorts with five published decisions from federal courts in 1987. A part of the plan to end the fifteen-year-old case involved adjustments to four vocational high schools. Capacity at the four schools is 6,700 students but only 1,700 were enrolled in 1986. The district court ordered the closing of two of the schools, in the face of the plummeting enrollment.[115] The district court also ordered changes in the vocational education component of the previously agreed upon desegregation plan. The district court left unchanged its previous order refusing to approve a four-year program at one of the four schools that earlier had been changed to a two-year program for juniors and seniors.

The district court's vocational education plan was reviewed by the Eighth Circuit Court of Appeals, which affirmed a 1986 district court slip opinion obligating the state to pay the total transportation costs for intradistrict transfers.[116] The appeals court also held that the lower court should hold a hearing on which of the vocational schools should be closed. The appeals court did so only after noting that the vocational schools still remain segregated and that the remand gave the parties a final chance to reach a voluntary agreement.

The Eighth Circuit court also reached a decision regarding class size and funding for special programs, issuing a second opinion to "restate" the first for the "convenience of the parties."[117] The participants apparently had been confused about the court's timetable for reaching a twenty-to-one student-teacher ratio, in nonintegrated elementary and middle schools, which the court intended to have in place by the start of the 1988-89 school year. The appeals court also modified lower court instructions regarding equipment transfers to the disputed vocational

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115. Liddell v. Board of Educ., St. Louis, 654 F. Supp. 334 (E.D. Mo. 1987). *See also* Liddell v. Board of Educ., St. Louis, 654 F. Supp. 345 (E.D. Mo. 1987) (stay in school closing granted; school closing does not impact negatively on handicapped children).

116. Liddell v. Board of Educ., St. Louis, 822 F.2d 1446 (8th Cir. 1987).

117. Liddell v. Board of Educ., St. Louis, 823 F.2d 1252 (8th Cir.1987), and 830 F.2d 823 (8th Cir. 1987).

school program.

Finally, in a decision with greater impact than the program adjustments made in 1987, the district court considered the question of needed capital improvements throughout the district.[118] In 1986 the Eighth Circuit had ordered the district to prepare a plan for capital improvements and to submit these to the voters in a bond referendum. In 1987 the district court received a $40 million list of capital improvements from the school district.

Both the district and appeals courts previously expressed, in the strongest language, that the present condition of school structures was so deplorable as to make any desegregation measure difficult. In the current case before the district court, the $40 million plan was rejected as totally inadequate and the court ordered the spending of almost $115 million, funded equally by both the district and the state.

A federal court on the opposite side of Missouri considered a long-range capital improvement plan that the court saw as "crucial" to the success of desegregation efforts in Kansas City.[119] The massive cost of the plan's magnet schools, involving 70% of the district's students, was already the subject of litigation in 1986. Likewise, the cost of capital improvements in the long-standing case has been high, with $37 million ordered in 1985 and another almost $67 million in 1986. In the matter before the court in 1987, the school district submitted a list of $194 million in capital improvements through the fall of 1990. The state defendants countered by proposing $61 million.

In weighing the competing capital project lists, the court literally became involved in the nuts and bolts of school planning, looking closely at what previous expenditures had accomplished and what remained to be done. The court also considered the ability of the district to pay for both capital and operating costs necessitated by desegregation, finding that the ability of the district to pay its share was severely limited. The district had been unable to secure a bond passage or a levy increase since 1969. Four referenda failed in 1986 and 1987. As a result, the court concluded, "its physical facilities have literally rotted."

Following an earlier Eighth Circuit opinion,[120] detailing steps to be taken if funds could not be extracted from voters, the lower court ordered the school district to issue $150 million in bonds by adding to the property tax and sales tax in Kansas City. A 1.5% surcharge on the income tax levied on anyone working or living in Kansas City was also added, so that those who lived in suburbs would help pay. The court

118. Liddell v. Board of Educ., St. Louis, 674 F. Supp. 687 (E.D. Mo. 1987).
119. Jenkins v. Missouri, 672 F. Supp. 400 (W.D. Mo. 1987).
120. Liddell v. Board of Educ., St. Louis, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 469 U.S. 816 (1984).

also raised the city school tax levy from $2.05 per $100 of assessed valuation to $4.00 to provide the district with more operating revenue, noting that the new figure was still much less than any neighboring district. While the court order was drastic, the court found that the majority could no longer deny the constitutional rights of a "helpless minority."

The school board in Richmond, Virginia was unsuccessful in convincing a district court that the state had a further obligation to assist with desegregation,[121] and the Fourth Circuit affirmed.[122] In 1984 the school board became a plaintiff in the case. The board could not persuade the district court that the mostly black school district had not achieved unitary status. Therefore, the burden was on the board plaintiffs to show that the state had engaged in action that furthered segregation. While the appeals court agreed that additional state compensatory and remedial program funding would help the Richmond schools, the court concluded that the state had not played a role in creating the virtually all-black schools.

A suit brought by the Cincinnati school board against the federal Department of Health, Education, and Welfare in 1974, seeking emergency school aid to assist with desegregation, finally was settled by a consent decree in 1987.[123] The consent decree was entered after the district court had prepared a forty-page decision in the case. The agreement committed the federal government to a nearly $2.9 million payment that the court was prepared to order, with the decree differing from the court's decision only by stipulating that $200,000 of the settlement was to be for attorneys' fees.

A lawsuit by the state board of education against the Peoria, Illinois Board of Education regarding segregation in that community's gifted education program came to an end in 1987. The suit originally involved the federal government as a plaintiff, but a settlement was reached and the government withdrew. The state board, however, continued to press the suit. A district court held that the state did not have standing to pursue the case and, on a two-to-one vote, the Seventh Circuit upheld the lower court.[124] The majority concluded that only the state attorney general could bring such a suit, following a lengthy analysis of Illinois statutes. In dissent, one judge argued that neither state law nor federal rules suggested that the attorney general, with no obligation to monitor

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121. Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986). *See* The Yearbook of School Law 1987 at 110.

122. School Bd. of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987).

123. Board of Educ., Cincinnati v. Department of H.E.W., 655 F. Supp. 1504 (S.D. Ohio 1987).

124. Board of Educ., Peoria v. Illinois State Bd. of Educ., 810 F.2d 707 (7th Cir. 1987).

education programs, should be expected to be the "watchdog" in this area.

A district court in Wisconsin heard a suit challenging the constitutionality of a state statute authorizing interdistrict transfer of pupils to promote integration.[125] A suburban Milwaukee minority student sought to attend a summer program in Milwaukee but was denied permission for reimbursement by his local board. A settlement in the case was reached but the plaintiffs sought to revive the suit for the purpose of challenging the constitutionality of the statute, which school officials used to permit white students to go from suburban areas to Milwaukee to further desegregation. This interesting reverse discrimination claim was rejected by the court because the plaintiffs had already reached a settlement. The court went on to hold, citing a Seventh Circuit case,[126] that minority students may be disadvantaged by components of integration plans, but that such claims must give way to advance court-approved integration.

The scope of the desegregation remedy in a sprawling, 700 square mile county school district involved in the Little Rock interdistrict desegregation case was before the district court four times in 1987. The three districts involved in the case reached an agreement with the state on a pupil transfer plan, on a timetable for a minority school administrator hiring plan, and on the use of tests to reduce the overrepresentation of blacks in special education classes. In the first of the decisions, the agreement was approved by the court.[127]

The Little Rock district and intervenors objected, in the second case, to a plan by the county district that left "white havens" to which it was alleged whites would move to avoid desegregated schools.[128] The court rejected the pleas that the plan should be overturned, observing that the district was so large that the alternative plan touted by the plaintiffs would mean that some children would face twenty-four mile one-way bus rides. The court expressed its sense that "the time for rancor and cram-down plans has passed," and that the county's voluntary plan should be given a chance to work. The court also approved expenditures for magnet schools, a deadline for student applications,[129] and a plan to call back laid-off minority teachers in disproportionate numbers if they

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125. Willan v. Menomonee Falls School Bd., 658 F. Supp. 1416 (E.D. Wis. 1987).

126. Samayoa v. Chicago Bd. of Educ., 798 F.2d 1046 (7th Cir. 1986). *See* The Yearbook of School Law 1987 at 113.

127. Little Rock School Dist. v. Pulaski County Special School Dist., 659 F. Supp. 383 (E.D. Ark. 1987).

128. Little Rock School Dist. v. Pulaski County Special School Dist., 656 F. Supp. 504 (E.D. Ark. 1987).

129. Little Rock School Dist. v. Pulaski County Special School Dist., 663 F. Supp. 1554 (E.D. Ark. 1987).

were disproportionately laid off by the boundary changes ordered as part of the settlement.[130]

A parents' group in Ft. Wayne, Indiana filed suit alleging that the local school board had maintained a dual school district and that the state had not acted to dismantle the system.[131] The defendants counterpleaded, seeking to dismiss the suit. They failed in their attempt to have the plaintiffs' standing rejected and the court held that eleventh amendment immunity from federal claims did not apply to the state officials sued in their official capacity, with only prospective relief permitted.

Desegregation Plan Oversight

As is apparent in many of the cases already discussed, courts have played a central role in overseeing the implementation of desegregation plans. School systems, in several of the oversight cases that follow, eventually seek a declaration that their district has achieved unitary status. In 1987 two courts arrived at a middle ground between unitary and nonunitary, declaring that they were placing a desegregation case on "inactive status." This amounted to a sort of probationary unitary status and, given the fierce disputes over what a declaration of unitary status might mean, may be a course of action used by district courts that see progress in desegregation but do not wish to abandon control of a case totally.

The Fifth Circuit rejected a desegregation plan that had been approved by a district court for the Hattiesburg, Mississippi School District.[132] Secondary school integration had been accomplished to the satisfaction of all parties through a court order entered in 1971. The district had never been declared unitary, however, and minority group plaintiffs filed suit in 1984 challenging the existence of five virtually all-black elementary schools, out of eleven in the district. The district court accepted a school district plan that would have converted two of the all-black schools into integrated magnet facilities. One of the five schools was to be closed and the remaining two would remain all black. The effectiveness of the court-approved magnet system would have taken three or more years to measure.

The timetable and the existence of the two remaining segregated schools caused the Fifth Circuit court to conclude that the lower court had erred in its decision. The appeals court found an overreliance on the

130. Little Rock School Dist. v. Pulaski County Special School Dist., 663 F. Supp. 1557 (E.D. Ark. 1987).

131. Parents for Quality Educ. v. Ft. Wayne Community Schools, 662 F. Supp. 1475 (N.D. Ind. 1987).

132. United States v. Pittman, 622 F. Supp. 622 (S.D. Miss. 1985), *rev'd*, 808 F.2d 385 (5th Cir. 1987).

fear of white flight and a failure by the lower court to consider pairing and clustering to accompany the magnet schools. The court, in remanding the case, also was influenced by the district's small geographic area, making it possible to redraw attendance zones without creating long travel times for students.

District court supervision of desegregation in Denver continued in 1987. The court had asked the parties, in a 1985 opinion and order,[133] to try to reach a resolution of all outstanding issues so that the system could be declared unitary. The parties failed in the attempt and the court asked for separate plans, which the parties submitted even though the school district appealed the court's 1985 order. Before the district court in 1987, then, was the school system's plan for reaching unitary status and the plaintiffs' response.[134]

The court rejected a variety of suggestions made by the plaintiffs for changes in the system's plan, concluding that it was time to "relax" the degree of court control over Denver desegregation. The court held that it would continue to work toward the issuance of a final injunction, needed since the state constitution was modified in 1974 to preclude busing for desegregation except where a federal court order is present. Even though the court's 1985 order was still under appeal, the court ordered the parties to continue to work on remaining elements of the plan while allowing the defendants to proceed with the student and teacher assignments that they had presented to the court.

The court continued the task of fashioning an injunctive decree in the second Denver case published in 1987.[135] In a reversal of the approach taken by most school defendants, the Denver system continued to express a strong desire to have the court approve each detail of the plan for magnet schools, other student assignments, and facilities decisions. To the court, this cast doubt on the defendants "ability and willingness" to desegregate. The court ordered the system to use its own "expertise and resources" to reach decisions on these matters, under a series of general guidelines that warned of segregation and discrimination but contained no numerical or quantitative limits on the system's policies. The court's "interim decree" was held to supercede all previous orders and was to govern the district's activities until such time as a permanent injunction might be entered. The court thereby put Denver in a middle category of supervision, between absolute court control and unitary status.

The First Circuit considered a consolidated set of appeals from

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133. Keyes v. School Dist. No. 1, 609 F. Supp. 1491 (D. Colo. 1985). *See* The Yearbook of School Law 1986 at 116.

134. Keyes v. School Dist. No. 1, 653 F. Supp. 1536 (D. Colo. 1987).

135. Keyes v. School Dist. No. 1, 670 F. Supp. 1513 (D. Colo. 1987).

three "final" Boston desegregation orders entered by the district court.[136] At issue was the general question of whether the district court was needlessly perpetuating its supervision of desegregation in Boston. The appeals were made by the city of Boston, contesting a "united facilities plan," by the school system, contesting the continuation of specified racial guidelines in pupil assignments, and by the teachers' union, appealing the requirements that 25% of the faculty and staff be black and 10% be from other minorities.

The appeals court began its analysis by concluding that the district had not achieved unitary status. It had, however, come so close that it remanded the case to the district court with a strong invitation that it reach the unitary finding. The appeals court concluded, on the question of student assignments, that unitary status had been achieved in that area and that further numerical control by the district court was unneeded. The appeals court used the Supreme Court's decision in *Pasadena City Board of Education v. Spangler*,[137] which held that it was possible to have unitariness in assignments without declaring the system unitary in all ways. On the teacher-hiring quota, the appeals court observed that the district had not objected to it and that the lower court's timetable for reaching the goal "struck a reasonable balance." On the facilities plan, the appeals court held that no controversy existed because the district had, in the interim, implemented the plan. The case was remanded to the district court and, with few matters left in dispute, it is possible that the litigation, after sixteen years, will soon come to an end.

The Bessemer, Alabama school district has operated under court order since 1971, as has Jefferson County in which Bessemer is located. In 1986 the city annexed two parcels of land that would add 200 and 700 students, respectively, to the city schools. The largest group of students were 94% black, and the addition of these students to the city schools would have an impact on the city's ability to continue school desegregation. The city sought to have the county continue to educate the group of 700 students, and the county objected, leading to a lawsuit that reached the Eleventh Circuit in 1987.[138] The district court held that the county must continue to educate the group while the county argued that the court was ordering interdistrict relief without evidence of an interdistrict violation, in contravention of the Supreme Court's holding in *Milliken v. Bradley*.[139] The appeals court held that the county had misread the situation, concluding that the relief sought was not inter-

136. Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).
137. 427 U.S. 424 (1976).
138. Brown v. Board of Educ., Bessemer, 808 F.2d 1445 (11th Cir. 1987).
139. 418 U.S. 717 (1974).

district in nature. The lower court's decision put no new burden on county schools and, because it was temporary in nature, was not an improper use of the court's injunctive powers.

Plaintiff intervenors sought to reopen active court supervision of school desegregation in Starkville, Mississippi.[140] The system had been submitting reports to the district court since 1972 and the plaintiffs now argued that the defendants had increased segregation through a student transfer policy, that the use of test scores to place children was discriminatory, and that staff hiring had discriminated on the basis of race. The court addressed each of these questions in detail, following a settlement by the parties on the transfer question, dismissing all claims after hearing from expert witnesses on each remaining issue. While the statistics on test scores and hiring were not favorable from the school system's perspective, the court concluded that there was lack of evidence that the differences between the races were due to discrimination.

140. Montgomery v. Starkville Mun. Separate School Dist., 665 F. Supp. 487 (N.D. Miss. 1987).

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HANDICAPPED

Nelda H. Cambron-McCabe

Introduction / 108
Entitlement to Services / 109
Procedural Safeguards / 110
  Rights of Parents or Guardians / 110
  Change in Placement / 111
    Program Modifications / 112
    Placement During Due Process Proceedings / 112
  Administrative Remedies / 113
Placement / 115
  Least Restrictive Environment / 115
  Private Facilities / 116
Related Services / 119
Discipline / 121
Remedies / 122
  Damages / 122
  Compensatory Services / 122
  Attorneys' Fees / 123
Statute of Limitations / 128
State Law / 128
Discrimination Under the Rehabilitation Act, Section 504 / 130
  Students / 130
  Employees / 132
    Handicapped Persons / 132
    Reasonable Accommodation for Otherwise Qualified Individuals / 135
    Other Issues / 137

INTRODUCTION

Litigation of handicapped students' and employees' rights showed a significant increase in 1987. The increase can be attributed primarily to the filing of a substantial number of cases to obtain attorneys' fees following the enactment of the Handicapped Children's Protection Act in 1986. Two major issues were raised in these cases: the availability of

attorneys' fees for administrative hearings and the constitutionality of the retroactive application of the law.

The most widely-publicized case was the United States Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*.[1] A teacher suffering from the contagious disease of tuberculosis was found to be a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act. While the Court did not address whether a person who is simply a carrier of a contagious disease is handicapped, the case will undoubtedly be paramount in interpreting the rights of AIDS victims.

ENTITLEMENT TO SERVICES

Under the EHA regulations, local educational agencies must provide special education and related services for private school handicapped children residing within their jurisdiction.[2] Questions have been raised about the delivery of special education services to parochial school sites in the wake of the Supreme Court's ruling that title I (now chapter I) services cannot be provided "on-site" for parochial school students.[3] Although the issue has generated substantial debate and concern, few legal cases have been decided. In 1987 two decisions were rendered in a New York case.

A New York school district terminated on-site special education programs to children of the Satmar Hasidic sect. Relying on a state education law, the school district sought a declaratory judgment that it was required to deliver special education services to nonpublic students only in the public schools and only in a nonsegregated setting (public and nonpublic students). A New York supreme court rejected this position, finding that it is permissible, and in some instances necessary, to provide services at other sites as long as the educational programs are not physically or educationally identified with the parochial school.[4] The court ordered the school district to furnish services through the use of mobile units or at other appropriate neutral sites.

A New York appellate court disagreed. Basing the method for delivery of services on the students' religious background rather than on the nature of their handicaps was held to violate the establishment clause of the federal and state constitutions.[5] Furthermore, the lower court

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1. 107 S. Ct. 1123 (1987).
2. 34 C.F.R. § 300.452.
3. *See* Aguilar v. Felton, 473 U.S. 402 (1985).
4. Board of Educ. Monroe-Woodbury Cent. School Dist. v. Wieder, 512 N.Y.S.2d 305 (Sup. Ct. 1987).
5. Board of Educ. Monroe-Woodbury Cent. School Dist. v. Wieder, 522 N.Y.S.2d 878 (App. Div. 1987).

order was found to usurp the school board's authority to evaluate and place students on the basis of their individual needs.

State law must be consulted to determine preschoolers' entitlement to special education and related services. The EHA mandates that services must be available for all children between the ages of three and twenty-one, but does not require a school district to provide programs for handicapped children under the state's minimum school age unless programs are being provided for nonhandicapped children in this age group.[6] While a New York appellate court noted that children under the age of five are not covered by the state education law, state law does authorize family court to order appropriate special educational services.[7]

The diagnosis of Acquired Immune Deficiency Syndrome (AIDS) does not automatically render a child "handicapped" within the meaning of the EHA. On a motion to dismiss a section 504 discrimination case brought by a child diagnosed as having AIDS, an Illinois school board argued that the court did not have jurisdiction because the child failed to exhaust the required EHA administrative procedures.[8] The court concluded that the EHA applies to AIDS victims only if their physical condition adversely affects their educational performance thereby requiring the provision of special education and related services.

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the EHA to ensure appropriate identification, evaluation, and placement of handicapped children. Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. After approval of the individualized education program (IEP), changes in the program must be preceded by procedural safeguards. The judiciary has frequently interpreted specific procedural rights and assessed school officials' compliance with the Act.

Rights of Parents or Guardians

The EHA mandates extensive parental involvement in the development of a handicapped child's education program. Courts have inter-

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6. *See* The Yearbook of School Law 1987 at 119 for a discussion of the Education of the Handicapped Amendments Act of 1986, which provided strong incentives for states to serve preschool children.

7. *In re* David "JJ", 517 N.Y.S.2d 606 (App. Div. 1987).

8. Doe v. Belleville Pub. School Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987).

preted the specific rights of parents in several cases. In a Massachusetts case, a noncustodial parent rejected two IEPs proposed by a school district and sought reimbursement for expenses he incurred in obtaining services for his mentally ill son.[9] On administrative appeal, the state rejected the claim on the ground that a divorced, noncustodial parent does not have standing to challenge the educational program proposed or to participate in the development of the IEP. Although neither federal nor state law addresses the rights of noncustodial parents, the Massachusetts federal district court concluded that the parent could not be excluded from the planning and implementation of his son's educational program. The court emphasized that unless a restraining order from a state court limits participation then the right to be involved is "basic." Moreover, the court found it imprudent to design a program without consulting the parent who had financial responsibility for the child's educational expenses.

Two cases involved the status of parents when a conservator or guardian is appointed. To facilitate a placement at a psychiatric hospital, a Texas father consented to a managing conservatorship for his child.[10] Subsequently, he brought suit under EHA to compel his school district to assume responsibility for a residential placement after the child reached eighteen years of age. The Fifth Circuit Court of Appeals held that the father did not have standing to sue; only the managing conservator could initiate suit. However, the court stated that the father could request appointment as "next friend" if the child's interests were not being protected by the conservator or the appointed attorney.

An educable mentally retarded Florida child was declared dependent under state law after the mother's repeated refusal to consent to special education placement.[11] Under the dependency status, a state trial court denied the mother's right to seek an administrative due process hearing after the child was placed without her consent. The appellate court held that dependent status could not be based solely on the educational needs of the child; there must be actual proof of abuse, abandonment, or neglect. Furthermore, the court concluded that the mother was entitled to pursue the administrative procedures regardless of the determination of dependent status on remand.

Change in Placement

Any substantive change in a handicapped student's placement triggers the procedural safeguards of the EHA. Cases in 1987 focused primarily on determining students' current educational placement.

9. Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987).
10. Susan R.M. v. Northeast Indep. School Dist., 818 F.2d 455 (5th Cir. 1987).
11. *In re* J.D., 510 So. 2d 623 (Fla. Dist. Ct. App. 1987).

Program Modifications. In a Washington case, parents argued that a change in tutors was a change in placement in violation of the EHA.[12] They alleged that the proposed new tutor was not qualified to provide the assistance their son required. The Ninth Circuit found it unnecessary to rule on the change in placement issue because the tutoring was not provided under an individualized education program (IEP). The child was eligible for special education and had received special instruction for a period of time but was placed in a regular classroom at the parents' request. The tutoring he later received was not "special education" under an IEP.

Placement During Due Process Proceedings. The "stay put" or "status quo" rule of the EHA provides that "[d]uring the pendency of any proceedings conducted . . . unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement . . . ."[13] Maintaining the status quo promotes stability and continuity in a handicapped child's educational program.

In two federal district court cases, the District of Columbia court granted preliminary injunctions requiring school districts to maintain current placements in a private facility during the pendency of the review proceedings.[14] The private placements were interim placements ordered by hearing officers because of the District of Columbia school system's failure to propose timely placements. The court noted in one case that unless a hearing officer limits a placement or rules that it is not the current educational placement, the placement is the child's current educational placement.[15] In the second case, the court found that although the hearing officer placed a time limit on the private placement, the school district's delay in proposing a public school placement justified the continuation of the private placement as the current placement during the due process proceedings.[16]

Virginia parents sought readmission to school for their handicapped son during a twenty-nine day suspension.[17] At the time of the suspension, he was not classified as handicapped but later through private testing he was diagnosed as learning disabled. The school district maintained that the child should not be readmitted to school but should remain in his current educational placement—under disciplinary suspension. The federal district court rejected this argument, finding that the denial of

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12. Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987).
13. 20 U.S.C. § 1415(e)(3).
14. Cochran v. District of Columbia, 660 F. Supp. 314 (D.D.C. 1987); Saleh v. District of Columbia, 660 F. Supp. 212 (D.D.C. 1987).
15. Saleh v. District of Columbia, 660 F. Supp. 212, 214 (D.D.C. 1987).
16. Cochran v. District of Columbia, 660 F. Supp. 314 (D.D.C. 1987).
17. Doe v. Rockingham County School Bd., 658 F. Supp. 403 (W.D. Va. 1987).

educational services once the EHA was triggered violated the language and intent of the "stay put" provision.

Administrative Remedies

The EHA mandates that parents or guardians must exhaust administrative procedures prior to seeking judicial review of educational placement or services decisions.[18] The Fourth Circuit Court of Appeals held that parents are not required to appeal a favorable decision of a local hearing officer in order to exhaust administrative remedies.[19] A decision at the local level is the final administrative decision in the state review process unless appealed by an aggrieved party. The court further held that only a party aggrieved by an administrative decision is entitled to bring a cause of action under the EHA; the law contains no provision for enforcement of final administrative decisions.[20]

While the exhaustion of administrative remedies is generally required, courts have recognized exceptions when evidence indicates that administrative remedies would be unproductive. The Second Circuit Court of Appeals cited three possible exceptions specified by Congress: "(1) it would be futile to use the due process procedures . . . ; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought). . . ."[21] In two separate cases, the appellate court denied a motion for judgment on the pleadings in a Connecticut case when parents alleged all three points[22] and awarded attorneys' fees in a New York case when parents did not exhaust remedies because adequate administrative remedies were not available and resort to the procedures could not or would not have corrected claims.[23] A Virginia federal district court held that a suspended handicapped student who was not offered administrative remedies and was left under suspension for twenty-nine days awaiting disciplinary proceedings was not required to exhaust procedures.[24] New York parents were not required to exhaust administrative remedies when the commis-

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18. In two cases, courts simply declined to entertain claims until administrative procedures were exhausted. Devries v. Fairfax County School Bd., 674 F. Supp. 1219 (E.D. Va. 1987); Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986).

19. Robinson v. Pinderhughes, 810 F.2d 1270 (4th Cir. 1987).

20. The court, however, held that plaintiffs had the right to bring a section 1983 suit for enforcement of the administrative decision.

21. Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987).

22. *Id.*

23. J.G. v. Rochester City School Dist. Bd. of Educ., 830 F.2d 444 (2d Cir. 1987).

24. Doe v. Rockingham County School Bd., 658 F. Supp. 403 (W.D. Va. 1987).

sioner of education had already considered the facts in the case and had declined to fund the parents' request.[25]

Courts rejected several claims that exhaustion of administrative remedies would be futile.[26] The Eleventh Circuit denied plaintiffs' futility argument when there was no attempt to employ the administrative procedures.[27] In this case, a suit was filed on behalf of 6,000 handicapped students alleging that the state of Alabama had violated the EHA by not providing the children a free appropriate education. The plaintiffs argued that the state was unable to conduct thousands of individual hearings, but the appellate court asserted that the filing of a few representative complaints would establish whether the process would be effective.

Two courts held that the exhaustion of administrative remedies was not required because of the nature of the complaints. The Kansas federal district court ruled that in-school suspensions up to five days did not constitute a change in educational placement and was not the type of action encompassed in the EHA protections.[28] An Illinois federal district court held that the EHA and its exhaustion requirement do not apply to an individual diagnosed as having AIDS unless special educational services are needed.[29]

Under the administrative review procedures of the EHA, a parent has the right to a written or electronic verbatim record of the hearing. Indigent New Hampshire parents challenged the state's refusal to provide a free written transcript to use in their suit against the state. The First Circuit interpreted the statute as granting the state the right to provide either alternative.[30] Accordingly, the court held that the state of New Hampshire had complied with the statute by providing an electronic recording.

A New York federal district court ruled that the state commissioner of education can review only the specific issues raised on appeal.[31] In this instance, the commissioner reversed a local commission's decision that a student was learning disabled. Since neither party raised the issue

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25. Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).

26. Association for Retarded Citizens of Alabama Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987); Davenport v. Rockbridge County School Bd., 658 F. Supp. 132 (W.D. Va. 1987); G.C. v. Coler, 673 F. Supp. 1093 (S.D. Fla. 1987); Hayes v. Unified School Dist. 377, 669 F. Supp. 1519 (D. Kan. 1987); White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987).

27. Association for Retarded Citizens of Alabama Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987).

28. Hayes v. Unified School Dist. 377, 669 F. Supp. 1519 (D. Kan. 1987).

29. Doe v. Belleville Pub. School Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987). *See* text with note 8, *supra*.

30. Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987).

31. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 674 F. Supp. 73 (N.D.N.Y. 1987).

on appeal, the court ruled that the commissioner had clearly exceeded his scope of authority. Review of the handicap issue on the appeal of an IEP would weaken the procedural safeguards of the EHA and discourage parents from seeking consideration of any issue.

The EHA requires state educational agencies to conduct an impartial review of the local educational agency's hearing and "make an independent decision upon completion of such review."[32] Under Oregon regulations governing review, a different standard of review exists; a state hearing officer can reverse a local referee's decision only if it is not supported by substantial evidence. An Oregon appellate court remanded a case that had received limited review and instructed the state superintendent to conduct an independent review, providing appropriate findings and analysis to support the conclusions.[33]

PLACEMENT

After agreement is reached on a child's IEP, an appropriate placement must be made at public expense. Alternative placements may include a regular classroom with support services, a regular classroom supplemented with resource room instruction, self-contained special classes, home instruction, and hospital or institutional instruction. Within this continuum of placements, a child must be educated in the least restrictive environment (LRE), which may be in a public or private school system depending on the needs of the child and the availability of an appropriate program.

Least Restrictive Environment

The EHA provides that "to the maximum extent appropriate, handicapped children . . . are to be educated with children who are not handicapped, and that . . . removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily."[34] In an Eighth Circuit case, parents asserted that the mainstreaming provision of the EHA required the school district to place their severely mentally retarded child in a regular elementary school rather than a state school for handicapped children.[35] The federal district court had held that the minimal benefit the child would receive from the placement and the high cost of providing a special teacher did not justify

32. 20 U.S.C. § 1415(c).
33. Tompkins v. Forest Grove School Dist., 740 P.2d 186 (Or. Ct. App. 1987).
34. 20 U.S.C. § 1412(5).
35. A.W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir. 1987).

the placement. The appellate court concurred, holding that cost of the placement and benefit to the child were appropriate considerations. The court emphasized that the provision is qualified by the language of the law specifying that mainstreaming is to occur "to the maximum extent *appropriate*."[36]

Mainstreaming was one of several reasons advanced by a Virginia federal district court in finding a proposed public school district IEP appropriate.[37] The private school selected by the parent educated only learning disabled students. The public school plan was designed to facilitate the transition of the child from special to regular classes, beginning with physical education and music and moving into science and social studies classes as he made sufficient progress. In a Pennsylvania case, a federal district court denied the parents' request for a private placement for their learning disabled son, reasoning that such a placement is appropriate only if a less restrictive program is not appropriate.[38]

Private Facilities

A frequent question raised again in 1987 was whether parents were entitled to reimbursement for tuition for unilateral private placements of their handicapped children. Public school districts are required to place handicapped children in private facilities only if an appropriate public placement is not available. If parents place their children in private facilities when an appropriate public school program is available, they must pay the costs. However, under the Supreme Court's 1985 decision in *Burlington School Committee v. Department of Education*, parents who unilaterally place their children in a private facility pending resolution of a placement may be awarded tuition reimbursement if it is later determined that the private placement is appropriate and the public school placement is inappropriate.[39]

The Fourth Circuit upheld a federal district court's award of tuition reimbursement to a Virginia parent.[40] The school district diagnosed the child as emotionally disturbed but the private testing arranged by the parent indicated a learning disability. When the district persisted in recommending a behavioral adjustment classroom, the parent placed her son in a private facility. The school district argued that tuition should

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36. *Id.* at 163.
37. Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987).
38. Garrick B. v. Curwensville Area School Dist., 669 F. Supp. 705 (M.D. Pa. 1987).
39. 471 U.S. 359 (1985). *See* The Yearbook of School Law 1986 at 128-29.
40. Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987). The parent also was held to be entitled to reimbursement for private testing for initial diagnosis of the disability, but not for tests to corroborate the findings.

be denied because the child was withdrawn prior to the initiation of administrative proceedings, prior to finalizing the individualized education program, and before the school district had an opportunity to conduct its own tests to corroborate the private testing. In upholding tuition reimbursement, the court noted that the district had sufficient evidence to support the learning disabled diagnosis and that even though the tests were incomplete it was evident that the child was not receiving an appropriate education in the public school program.

The Eleventh Circuit stated that the amount of tuition reimbursement must be determined by balancing the equities of a particular case.[41] In balancing the equities, a Georgia federal district court held that parents were entitled to some reimbursement but not the full costs of placing their child in a residential facility in Tokyo, Japan.[42] A Texas parent was awarded reimbursement but only for costs incurred after challenging the IEP.[43] The court noted that a school district does not have an opportunity to be responsive to a parent's requests unless a complaint is filed.

Tuition or other private expenditures were denied in several instances. The Ninth Circuit rejected a claim for reimbursement for supplemental tutoring when the IEP was found to be appropriate.[44] Reimbursement was denied by a Washington appellate court when parents unilaterally placed their child in a private school without giving the school district an opportunity to assess the child's educational needs.[45] The court emphasized that parental disagreement with a school system's proposed program is an essential element in the right to reimbursement.

The EHA requires states to ensure that private schools providing services to handicapped students at public expense meet state educational standards. In two cases, parents who unilaterally placed their children in unapproved facilities were denied reimbursement for costs.[46] However, because of unique circumstances, a New York federal district

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41. Jenkins v. Florida, 815 F.2d 629 (11th Cir. 1987) (case remanded for parties to present facts on the equity issue).

42. Drew P. v. Clarke County School Dist., 676 F. Supp. 1559 (M.D. Ga. 1987).

43. Garland Indep. School Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987). The parent received reimbursement for services secured to supplement the school district's program. Although the residential program was the appropriate placement, the parent was not penalized because she could not afford such a program.

44. Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987). *See also* Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987) (reimbursement for private education denied).

45. Hunter v. Seattle School Dist. No. 1, 731 P.2d 19 (Wash. Ct. App. 1987).

46. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987); Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987).

court ordered placement of a child in such a facility.[47] The court found reimbursement of costs and continued placement justified since the commissioner of education had not been able to identify an appropriate alternative placement. Further in support of the placement, the court noted that there was no dispute that the child would receive an appropriate education in the private school and that the school had approval status at the time the parents initiated administrative proceedings.

According to the North Carolina State Board of Education's interpretation of state law, a hearing can be conducted on the issue of tuition reimbursement, but a hearing officer is not authorized to make an award. A federal district court held that this position was inconsistent with the EHA, and federal law must supersede state law.[48] However, upon review by the Fourth Circuit, the case was declared moot because the parents and the local board of education had agreed to a partial settlement.[49] The only questions remaining involved injunctive and declaratory relief against state officials to forbid enforcement of the restriction on hearing officers. Since the parents had achieved their primary objective of reimbursement, further relief from the appellate court was not needed. The court noted that future violations of the EHA rights would be unlikely to occur in light of a "Letter Ruling" from the Department of Education supporting the federal district court decision.

Several states raised the eleventh amendment as a bar to the recovery of tuition costs. Under the eleventh amendment, states cannot be sued in federal courts unless they consent through waiver of immunity or Congress expressly abrogates immunity. The Supreme Court's 1985 decision holding that the Rehabilitation Act of 1973 did not abolish states' immunity to suit has raised questions regarding states' immunity to suits under the EHA.[50] Three federal district courts adopted the reasoning advanced earlier by the First Circuit and concluded that Congress acted pursuant to its fourteenth amendment powers in enacting the EHA and that the intent to abrogate eleventh amendment immunity was unmistakably clear.[51]

In addition to tuition reimbursement requests, courts addressed school districts' obligation to pay for noneducational costs associated with private placements. The District of Columbia federal district court

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47. Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987).
48. S-1 v. Spangler, 650 F. Supp. 1427 (M.D.N.C. 1986).
49. S-1 v. Spangler, 832 F.2d 294 (4th Cir. 1987).
50. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
51. Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987); Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987); Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986). *See* David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1790 (1986); The Yearbook of School Law 1986 at 140-41.

held that the board of education was required to fund a student's placement in a group home as well as a private day school.[52] Although the group home was a separate facility, it was an essential part of the total educational program. A New York federal district court examined a school district's financial responsibility for a residential psychiatric hospital placement.[53] The court noted that case law has established that "[a]s long as the child is properly educable only through a residential placement, when the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement."[54] In this case, the court found that the educational handicap could not be separated and treated apart from the emotional and behavioral problems. Consequently, the school district was unable to satisfy its obligation under the EHA by simply paying tuition for the education component of the hospital program. A trial was ordered to assess which expenses were maintenance, support services, or medical.

RELATED SERVICES

The EHA specifies that an appropriate education includes special education *and* related services "required to assist a handicapped child to benefit from special education."[55] Cases in 1987 addressed full-time nursing services, transportation, counseling, and psychological services.

In 1986 a New York federal district court held that a school district was not required to provide constant nursing care to enable a handicapped student to attend school.[56] The Second Circuit Court of Appeals affirmed the decision, noting that where nursing care had been required previously by a court it was intermittent, not constant.[57] The Supreme Court denied *certiorari*.[58]

Similarly, nursing care was an issue in a Pennsylvania case.[59] A severely handicapped child required the constant undivided attention of a nurse to perform varied and extensive services, especially the suctioning of mucous from the lungs. The Pennsylvania federal district court distinguished between intermittent and constant care, as did the

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52. Kerkam v. District of Columbia Bd. of Educ., 672 F. Supp. 519 (D.D.C. 1987) (parents also were awarded reimbursement for expenditures).
53. Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).
54. *Id.* at 1039.
55. 20 U.S.C. § 1401(17).
56. *See* The Yearbook of School Law 1987 at 129.
57. Detsel v. Board of Educ. of Auburn Enlarged City School Dist., 820 F.2d 587 (2d Cir. 1987).
58. 108 S. Ct. 495 (1987).
59. Bevin H. v. Wright, 666 F. Supp. 71 (W.D. Pa. 1987).

Second Circuit in the previous case. Constant care was considered to be too intensive and costly and more closely related to medical services. The court, however, cautioned that related services are not limited simply to services that can be provided at a low cost.

Related services must be provided if they are needed for a student to derive some benefit from an educational program. Counseling and psychological services were found to be essential for a New York child "to derive any benefit from special instruction."[60] A Massachusetts hearing officer denied reimbursement of the costs of individual psychotherapy and group therapy because a child's education was not the "central or primary" focus of the sessions.[61] The federal district court overturned the decision, holding that neither the federal nor state law require related services to be primarily for educational purposes; they must simply assist the child to benefit from special education.

In several cases, courts examined school districts' responsibility for transportation costs as a related service for students who are unilaterally placed in private schools. Section 300.451(a) states, in part, that provision must be made for "the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services." The District of Columbia federal district court interpreted the provision to require school districts to provide private school students with certain services where necessary.[62] As examples, the court noted that speech therapy or a specific learning disability might require special instruction and/or transportation to another site. The provision was not found to encompass related services costs when an appropriate public school program has been rejected by parents.

An Ohio federal district court concluded that "related services" must be interpreted in conjunction with the term "special education."[63] That is, related services are required only for special education programs designed, established, funded, and monitored by the state or local school district. The court also concurred that there is no obligation to pay for private school costs such as transportation when parents decline an appropriate public school placement. A New Jersey appellate court concluded that transportation to a private school was not mandated for an orthopedically handicapped student who did not require special education services.[64] The court cited the Supreme Court's statement that "[i]n the absence of a handicap that requires special education, the need

60. Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987).
61. Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987).
62. Work v. McKenzie, 661 F. Supp. 225 (D.D.C. 1987).
63. McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987).
64. A.A. v. Cooperman, 526 A.2d 1103 (N.J. Super. Ct. App. Div. 1987).

for what otherwise might qualify as a related service does not create an obligation under the Act."[65]

DISCIPLINE

Courts reaffirmed that handicapped students are not exempt from reasonable disciplinary measures. An Indiana hyperactive and emotionally disturbed student challenged specific discipline techniques as a violation of his constitutional right to due process and equal protection of the laws.[66] Under the circumstances of the case, the court found that paddling, isolation seating, and taping of the mouth did not violate the student's rights. The paddling was not excessive and was preceded by a discussion with the child's father and warnings to the student. Isolation was characterized as a "relatively innocuous" discipline technique and was warranted because of the child's behavior. The taping of the student's mouth (performed by the student) was viewed as symbolic, rather than punitive, to remind the student to be silent. The Kansas federal district court held that the use of a time-out room for suspension and cool-down periods did not violate handicapped students' liberty and property rights.[67] While the court noted that it might not be the "most effective or sensible disciplinary measure," students were not deprived of an education and were prevented from threatening the safety of other students. Furthermore, students were given adequate notice of behavior that would result in isolation.

The eighth amendment was raised as a bar in two discipline cases.[68] In both instances, the courts rejected the claims based on the Supreme Court's interpretation that the amendment is applicable only in criminal cases.[69]

A Virginia federal district court held that a handicapped student's due process rights were violated by school officials' failure to provide a prompt hearing in a twenty-nine day suspension.[70] The initial suspension occurred prior to a determination that the child was handicapped, but even the minimum basic due process rights mandated for regular students by the Supreme Court in *Goss v. Lopez* were not provided.[71] Also, school officials refused to reinstate the child when they were informed

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65. *Id.* at 1106, *quoting* Irving Indep. School Dist. v. Tatro, 468 U.S. 883, 894 (1984).
66. Cole v. Greenfield-Central Community Schools, 657 F. Supp. 56 (S.D. Ind. 1986).
67. Hayes v. Unified School Dist. No. 377, 669 F. Supp. 1519 (D. Kan. 1987).
68. Garland Indep. School Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987); Hayes v. Unified School Dist. No. 377, 669 F. Supp. 1519 (D. Kan. 1987).
69. Ingraham v. Wright, 430 U.S. 651 (1977).
70. Doe v. Rockingham County School Bd., 658 F. Supp. 403 (W.D. Va. 1987).
71. 419 U.S. 565 (1975).

that he had been diagnosed as handicapped. Summary judgment was granted for the parents based on the school district's failure to inform the parents of their rights under the EHA or to comply with any of its procedural requirements.

The Supreme Court of Mississippi examined the question of whether a school system can expel handicapped children who disrupt the educational program of other children.[72] Citing decisions of the Fourth and Fifth Circuits, the court recognized school officials' "restricted power" to expel handicapped students. Accordingly, the court held that if a child's disruptive behavior is related to the handicapping condition, a change in placement might be warranted but not expulsion. Expulsion could be considered if the behavior is not related, but educational services must be provided during the expulsion period.

REMEDIES

Damages

Courts are in agreement that monetary damages are not available under the EHA unless exceptional circumstances exist showing bad faith and egregious failure to comply with the procedural provisions of the Act.[73] Such exceptional circumstances were not found in a Michigan case.[74] Two other courts simply held that monetary damages were not recoverable.[75] The Connecticut federal district court, however, denied state defendants' motion to dismiss a claim for damages where bad faith was alleged.[76]

Compensatory Services

Courts have found an award of compensatory educational services to be analogous to the granting of retroactive tuition reimbursement. A California appellate court concluded that handicapped children in a state hospital would be entitled to compensatory educational services if they prevailed on their claim that the state had denied them a free appropriate public education.[77]

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72. Board of Trustees of Pascagoula Mun. Separate School Dist. v. Doe, 508 So. 2d 1081 (Miss. 1987).

73. The Supreme Court carefully distinguished between awarding tuition reimbursement and awarding damages; reimbursement is simply the recovery of costs. Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985).

74. Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987).

75. Johnson v. Clark, 418 N.W.2d 466 (Mich. Ct. App. 1987); White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987).

76. Silano v. Tirozzi, 651 F. Supp. 1021 (D. Conn. 1987).

77. White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987).

Attorneys' Fees

After the Supreme Court's decision in *Smith v. Robinson*[78] declaring that attorneys' fees are not recoverable under the EHA and that the EHA is the exclusive means for enforcing handicapped children's rights to special education programs, Congress enacted the Handicapped Children's Protection Act (HCPA) to grant courts the discretion to award reasonable attorneys' fees to parents who prevail against school systems.[79] Fees are recoverable for any action or proceeding filed after July 3, 1984 or pending at that time. Several limitations were placed on awards: (1) fees must be based on comparable rates in the community for similar legal services, with no bonus or multiplier permitted in calculating the amount;[80] (2) fees may not be awarded for legal services performed after a parent's or guardian's rejection of an education agency's written offer of settlement (made within specified time frames) if the final relief gained through the due process hearing or court action is not more favorable than the settlement offer; and (3) where the education agency has not prolonged the controversy or violated procedural safeguards of the EHA, fees may be reduced if the parent or guardian "unreasonably protracted" the controversy, or the time spent on the action and services was excessive compared to similar proceedings.

One of the most frequently raised questions in 1987 was whether the HCPA authorizes the award of attorneys' fees for work conducted solely at the administrative level. The amendment provides that in "any action or proceeding" a court may award fees.[81] School districts argued that the parents or guardians must file suit based on the merits of a case, not simply to recover attorneys' fees. Most courts found that the plain wording of the statute (any action or *proceeding*) combined with the legislative history clearly established that fees are available for work at the administrative level.[82] The debates in Congress unambiguously show an intent for the recovery of attorneys' fees for administrative proceedings. The federal district court of Kansas noted Senator Simon's remarks: "For minority group parents, for low-income as well as mod-

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78. 469 U.S. 992 (1984).

79. 20 U.S.C. § 1415(e) (1986).

80. A bonus or multiplier is sometimes used in unusually difficult cases or cases that involve a significant public issue.

81. 20 U.S.C. § 1415(e)(4)(D).

82. Burpee v. Manchester School Dist., 661 F. Supp. 731 (D.N.H. 1987); Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987); Mathern v. Campbell County Children's Center, 674 F. Supp. 816 (D. Wyo. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); Prescott v. Palos Verdes Peninsula Unified School Dist., 659 F. Supp. 921 (C.D. Cal. 1987); School Bd. of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).

erate income parents, the right to obtain reimbursement for assistance they may need at the administrative level is critically important to assure fair and equal access to the formal procedures mandated by Congress . . . ."[83]

Because Congress fashioned the fee awards of HCPA after other fee shifting statutes, several school districts argued that the legislative history of the law should be examined in light of the Supreme Court's decision in *North Carolina Department of Transportation v. Crest Street Community Council.*[84] In that case, the Court held that attorneys' fees under 42 U.S.C. section 1988 are to be awarded for administrative proceedings only if they are part of a lawsuit. Earlier, however, the Supreme Court had noted in dicta that it would be anomalous for a court to award fees if a case proceeded to court but not award fees if it were resolved at the administrative level.[85] The latter case was cited in reports by both the Senate and House to support attorneys' fees for administrative level work. While the federal district courts of the District of Columbia, Kansas, and New Hampshire recognized Congress's desire to pattern the amendment after fee provisions in other civil rights statutes, the application of the *Crest Street* ruling was found to be inappropriate because of the clear intent to provide for the award of attorneys' fees for administrative proceedings.[86] The federal district court of Delaware, however, disagreed, finding that the overriding congressional intent was to have the attorneys' fees provision interpreted as all other civil rights fee shifting statutes.[87]

The constitutionality of the retroactive application of the attorneys' fees provision of the HCPA was raised in a number of cases. School districts argued that retroactivity violated the separation of powers, Congress's spending power under article I, section 8 of the Constitution, and the eleventh amendment. Federal district courts in the District of Columbia and Virginia held that separation of powers does not prevent Congress from clarifying its own legislation.[88] The separation of powers would be violated only if the statute prescribed a rule of decision in a pending case. The HCPA does not affect the substantive decisions of these cases.

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83. Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).

84. 107 S. Ct. 336 (1986).

85. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

86. Burpee v. Manchester School Dist., 661 F. Supp. 731 (D.N.H. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).

87. Rollison v. Biggs, 660 F. Supp. 875 (D. Del. 1987).

88. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); School Bd. of the County of Prince William v. Malone, 662 F. Supp. 999 (E.D. Va. 1987).

Because legislation enacted pursuant to Congress's spending power is similar to a contract, school districts claimed that they must voluntarily and knowingly accept the terms of the contract. In several cases, school districts urged courts to hold the HCPA unconstitutional because it imposed a condition on a grant of federal money, one which the districts were unaware when they accepted the funds.[89] To support this argument school districts raised the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman* as a bar to retroactive application.[90] Reliance of the school districts on *Pennhurst*, however, was found to be misplaced. The Supreme Court did not hold that Congress could not retroactively condition the receipt of funds; rather the Court held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[91] Several courts noted that the HCPA certainly would meet this test.[92] The federal district courts of Connecticut and Kansas emphasized that the EHA was not enacted solely on the basis of Congress's spending power but also was based on the fourteenth amendment to assure equal protection of the law.[93] They concluded that the legislation was constitutional because it is rationally related to a legitimate legislative purpose.

Two cases addressed whether the HCPA violated the school districts' sovereign immunity under the eleventh amendment.[94] The courts noted that the EHA was enacted under the fourteenth amendment, and that Congress has the power to set aside sovereign immunity to enforce the fourteenth amendment.

Only a parent or a guardian who is the prevailing party is eligible for an award of attorneys' fees. A Texas federal district court held that a parent who prevails on the central issue by acquiring the relief requested is the prevailing party.[95] Although the hearing officer in this case decided

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89. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987); School Bd. of the County of Prince William v. Malone, 662 F. Supp. 999 (E.D. Va. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987); Yaris v. Special School Dist. of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987).

90. 451 U.S. 1 (1981).

91. *Id.* at 17.

92. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987); Yaris v. Special School Dist. of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987).

93. Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).

94. *See* Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Yaris v. Special School Dist. of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987).

95. Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987). *See also* Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Garland Indep. School Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987).

only two of the five points raised in the hearing in favor of the parents, the court found the parents to be the prevailing party because the educational program developed by the school district was determined to be inadequate. Similarly, the federal district courts of Delaware and the District of Columbia held that parents are the prevailing party "if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing suit."[96] Nine plaintiffs prevailed in the District of Columbia case when they received all the benefits requested; parents who were denied tuition reimbursement did not prevail in the Delaware case. Parents who reached a settlement through a consent decree were declared the prevailing party in Connecticut[97]

One case addressed the interpretation of "pending" cases for the purpose of attorneys' fees under the HCPA. As noted, the amendment provides that parents are eligible for fees if an action or proceeding was filed prior to July 4, 1984 or was pending on that date. In a District of Columbia case, the school board argued that a case is pending only if the merits of the controversy are unresolved.[98] The law, however, does not distinguish between cases pending on their merits and those pending on fee applications. The federal district court found that congressional intent to restore fully rights diminished by *Smith v. Robinson*[99] would support a broad interpretation of pending. Accordingly, the court concluded that "it would be anomalous for Congress to enact a statute that reverses *Smith* and then not have it affect a case which the [c]ourt of [a]ppeals decided on the authority of *Smith*. Only a comprehensive definition of 'pending' would fully eliminate the repercussions of *Smith*."[100]

The reasonableness of attorneys' fees was an issue in several cases. The courts used the lodestar method, which is the number of hours reasonably expended multiplied by a reasonable hourly rate.[101] Prior to a determination of an appropriate award, however, a plaintiff's attorneys must submit a detailed affidavit outlining the amounts claimed and on what basis. The information requested by the District of Columbia federal district court illustrates the specificity required. The court requested a statement including: "(1) the nature of the claim; (2) whether

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96. Moore v. District of Columbia, 674 F. Supp. 901, 904 (D.D.C. 1987), *quoting* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Rollison v. Biggs, 660 F. Supp. 875 (D. Del. 1987). *See* Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987) (school district placement upheld).

97. Barbara R. v. Tirozzi, 665 F. Supp. 141 (D. Conn. 1987).

98. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987).

99. 468 U.S. 992 (1984).

100. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14, 17 (D.D.C. 1987).

101. *See* Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Esther C. v. Ambach, 515 N.Y.S.2d 997 (Sup. Ct. 1987); School Bd. of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987).

the plaintiff has prevailed on the merits; (3) how many hours were spent on the claim and how this time was spent; (4) the billing rate for this time; (5) the total amount claimed."[102] In this case, the defendant school district requested the time charge-slips that formed the basis for aggregate charges and also requested the actual bills. The court held that adequate documentation is required but not the bills. The preparation of a bill was recognized as a formality because most clients in EHA cases do not have the financial resources to pay the fees.

The Delaware federal district court denied parents' request for an additional amount because of the delay in payment of the attorneys' fees.[103] In essence, the delay factor would have raised the fees to the current market rate, increasing the award from $77,915 to $97,514. While the court recognized that the delay factor could be granted under the HCPA, it was unwarranted in this case since the delay resulted from the enactment of the amendment several years after the commencement of the lawsuit, not from the actions of the defendants.

In the Delaware case, the defendants challenged $77,915 as being disproportionate to the plaintiff's settlement of $4,829, which represented all the relief requested.[104] Relying on a recent Supreme Court decision interpreting fees under section 1988, the court declined to reduce the fees, noting that settlements cannot be viewed solely in individual financial terms because of the public benefit that is derived from civil rights litigation.[105]

In the District of Columbia case the federal district court expressed dissatisfaction with school officials' "do not settle, do not pay" stance regarding attorneys' fees.[106] Numerous criticisms were made by the school district against plaintiffs' counsel: attacked efficiency and integrity of attorneys; criticized counsel's scheduling practices; requested extensive documentation of all charges; and demanded actual bills. The court characterized the school district's actions as "stonewalling" and "nit-picking" and warned that the delay that occurred in this case should not be repeated. Of plaintiffs' total award of $48,474 for attorneys' fees, $29,357 was granted for the litigation of the merits of the case and $19,117 for the litigation of the attorneys' fees question.

The Second Circuit awarded attorneys' fees under 42 U.S.C. section 1988 in a case brought under the EHA and section 1983.[107] By awarding

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102. Moore v. District of Columbia, 674 F. Supp. 901, 902 (D.D.C. 1987) (Moore II). *See also* Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987).
103. Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987).
104. *Id.*
105. *Id., citing* City of Riverside v. Rivera, 106 S. Ct. 2686 (1986).
106. Moore v. District of Columbia, 674 F. Supp. 901 (D.D.C. 1987).
107. J. G. v. Rochester City School Dist. Bd. of Educ., 830 F.2d 444 (2d Cir. 1987). *See* The Yearbook of School Law 1987 at 134.

fees under section 1988, the court avoided addressing whether a direct cause of action can be filed under EHA when administrative procedures have not been exhausted. The court, however, did conclude that the circumstances justified an exception to the exhaustion requirement.

STATUTE OF LIMITATIONS

Since the EHA does not contain a statute of limitations for filing suits, courts determine which state law provisions are analogous to the federal law. The Fourth Circuit Court of Appeals upheld a federal district court's application of a Virginia one-year limitation that is applied to all personal actions for which no limitation is specified.[108] A statute that appeared to be analogous provided only a short thirty-day limitation period which the court felt would conflict with EHA policy. The most serious concern, however, was the fact that many parents would not be represented by an attorney in the administrative proceedings and might not be apprised of the short limitation period. The New Hampshire federal district court also declined to apply a thirty-day limitation, finding that a suit filed within sixty-four days was certainly reasonable.[109] A four-month limitation period was invoked by a New York federal district court.[110]

The Ninth Circuit Court of Appeals rejected the application of the California statute of limitations tolling provision for children under the age of majority.[111] The court stated that such a provision would undercut federal policy designed to assure timely and appropriate educational programs for handicapped students. To permit a child to file suit later would be inconsistent with the substantial rights conferred on parents on behalf of their children.

STATE LAW

The EHA allows the aggrieved party in state administrative proceedings to file suit in state or federal court.[112] In a Virginia case, two school boards that were ordered to pay children's private school tuition appealed the decisions under state law in state circuit courts. The students and parents removed the case to federal court, and the school boards moved to remand the action to state courts.[113] The court was

108. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987).
109. Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986).
110. Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).
111. Alexopulos v. San Francisco Unified School Dist., 817 F.2d 551 (9th Cir. 1987).
112. 29 U.S.C. § 1415(e)(2). *See* Board of Trustees of Pascagoula Mun. Separate School Dist. v. Doe, 508 So. 2d 1081 (Miss. 1987).
113. Amelia County School Bd. v. Virginia Bd. of Educ., 661 F. Supp. 889 (E.D. Va. 1987).

guided in its assessment of removal by the application of the federal question jurisdiction—that is, whether the case arises under the Constitution, laws, or treaties of the United States. To determine whether the case involved federal law, the court applied the "well-pleaded complaint" rule. Under this rule, a court must look to what appears in the plaintiffs' statement of the issues. However, defendants may invoke an exception to the rule, the "artful pleading" doctrine, to recharacterize the state claim as a federal claim if federal law provides a cause of action to remedy the alleged wrong and the state law claim is preempted by federal law. Because federal law clearly provides a cause of action, the court focused on whether the EHA preempts the Virginia law claims. Relying on the principle of "cooperative federalism" articulated by the First Circuit, the court concluded that the Act did not preempt state law. The federal law provides financial assistance but "does not presume to impose a uniform approach to the education of children within a given disability; it requires only that a 'free appropriate education,' in conformity with the state's educational standards, be provided to each disabled child . . . ."[114] The court concluded that the EHA does not preempt state law as long as state standards meet the minimum federal guidelines. Virginia law was found clearly to meet the federal requirements, leaving the school boards as "masters of their claims."

Plaintiffs in a Michigan case maintained that state law provided a higher level of educational opportunity than the EHA.[115] The Michigan special education law specifies that educational agencies "shall provide special education programs and services designed to develop the maximum potential of each handicapped person."[116] On denying defendants' motion for summary judgment, the federal district court concluded that state court decisions and other statutory provisions indicate that the state law does not require the best possible program but, at the same time, requires "something more than the basic federal minimum."[117]

State law was the controlling issue in a New York case. The Second Circuit ruled that abstention was appropriate in the case until state courts interpreted the term "actual and only residence" in the state education law.[118] A Pennsylvania commonwealth court affirmed a common pleas court order granting a school district's motion for a judgment on the pleadings.[119] The public school code did not establish an entitle-

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114. *Id.* at 893, *quoting* Town of Burlington v. Department of Educ. of Massachusetts, 736 F.2d 773, 784 (1st Cir. 1984, *aff'd sub nom.* Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985).

115. Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987).

116. *Id.* at 1304.

117. *Id.*

118. Catlin v. Ambach, 820 F.2d 588 (2d Cir. 1987).

119. Agostine v. School Dist. of Philadelphia, 527 A.2d 193 (Pa. Commw. Ct. 1987).

ment to monetary relief for injuries resulting from misdiagnosis and incorrect educational placement of handicapped children.

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

The Rehabilitation Act of 1973, section 504, provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[120] Section 504 is broader than the EHA and applies to educational and noneducational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

As noted, the Supreme Court in *Smith v. Robinson* interpreted the EHA as the exclusive means for enforcing handicapped students' rights to a free appropriate education.[121] In response to this decision, Congress enacted the Handicapped Children's Protection Act (HCPA) of 1986, stipulating *inter alia* that the EHA does not restrict rights or remedies available under the federal Constitution, section 504 of the Rehabilitation Act, or other civil rights statutes.[122] While Congress specifically stated that the attorneys' fees provision of the HCPA is retroactive, the omission of such a provision for the nonexclusivity section has led to disagreements among courts regarding the retroactive effect of the law.

Courts have generally invoked the principle advanced by the Supreme Court that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[123] A Connecticut federal district court rejected retroactive application, finding that all three exceptions existed.[124] The court pointed to the explicit retroactive designation for the attorneys' fees section and the absence of a parallel provision for the nonexclusivity provision. The legislative history indicated that the initial House bill contained retroactive applica-

120. 29 U.S.C. § 794.
121. 469 U.S. 992 (1984).
122. 20 U.S.C. § 1415.
123. Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974).
124. Silano v. Tirozzi, 651 F. Supp. 1021 (D. Conn. 1987). *See* DeFalco v. Deer Lake School Dist., 663 F. Supp. 1108 (W.D. Pa. 1987) (held EHA is exclusive remedy; no recognition of enactment of HCPA).

tion for both sections, but the Senate bill, which contained retroactive application only for attorneys' fees, was adopted. Furthermore, the court reasoned that manifest injustice would result since the educational agencies were not liable at the time the actions occurred or the litigation was initiated.

A New Hampshire federal district court denied retroactive application of the nonexclusivity provision based on the lack of specific congressional intent and the legislative history,[125] but on a motion to reconsider, held that it did apply to cases pending at the time of enactment because no exceptions were found to the Supreme Court's general principle of application in pending cases.[126] Similarly, the Second Circuit also found the nonexclusivity provision to be applicable to pending cases.[127] The court stated that the HCPA "simply codifies a congressional purpose long in place which Congress believed the Supreme Court had misinterpreted."[128]

Discrimination is prohibited under section 504 only if a program or activity receives federal financial assistance. Most courts have relied on the Supreme Court's interpretation of title IX that institution-wide financial assistance is inadequate to initiate a case; an individual must claim involvement or exclusion in a program that receives assistance. A student who claimed she was expelled from a nursing program of a private college because of her obesity was unable to show that the nursing program received any federal financial assistance.[129] Similarly, a student seeking admission to a graduate program in English in a private university produced "absolutely no evidence" that the department was the recipient of federal funds.[130]

Courts continued to hold that children infected with AIDS or testing seropositive for AIDS are protected by the Rehabilitation Act. Preliminary injunctions allowing these children to attend school were issued in two cases. A Florida federal district court concluded that exclusion of three hemophiliac brothers from a normal, integrated classroom constituted irreparable injury to the children's well-being and educational potential. Also, expert medical evidence supported returning the children to the regular classroom, and the children were likely to prevail on the merits of the case at trial.[131] Admission to the regular classrooms was

125. Edward B. v. Brunelle, 660 F. Supp. 51 (D.N.H. 1986).
126. Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986).
127. Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987). *See also* Dodds v. Simpson, 676 F. Supp. 1045 (D. Or. 1987); G.C. v. Coler, 673 F. Supp. 1093 (S.D. Fla. 1987).
128. *Id.* at 755.
129. Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986).
130. Stephanidis v. Yale Univ., 652 F. Supp. 110, 113 (D. Conn. 1986), *aff'd*, 814 F.2d 654 (2d Cir. 1987).
131. Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987).

predicated on adherence to a list of guidelines issued by the court. These included: (1) attendance was to be governed by the published guidelines of the Centers for Disease Control and the American Academy of Pediatrics; (2) the children were charged with taking on adult responsibility for being informed of the applicable guidelines and following them stringently; (3) the children were to avoid contact sports or other situations that might result in injury; (4) the school system was to educate the school parent population of the community regarding AIDS; and (5) the children were required to be retested every six months.

A preliminary injunction (and later a permanent injunction) also was issued allowing a California child with the AIDS virus to return to a regular kindergarten classroom.[132] The state high court held that the state board of education possessed the authority to issue guidelines compelling local educational agencies to admit school children with AIDS unless exceptional conditions were present. The child was initially excluded following a biting incident. While the Centers for Disease Control, the American Academy of Pediatrics, and the California State Department of Education have published guidelines advising a more restricted environment for young children who bite, the federal district court concluded that the "overwhelming weight" of medical evidence does not support that AIDS is transmitted by human bites. Accordingly, the court held that the child posed no risk of harm to others in the classroom.

In a motion for summary judgment, a Missouri federal district court addressed whether a person with a contagious disease which does not involve a physical impairment is a "handicapped individual" under section 504.[133] Because an active carrier of hepatitis B is regarded as having an impairment, the federal district court reasoned that such a person is a "handicapped individual." Summary judgment was denied because of material facts in dispute as to whether the handicapped person was denied admission to a learning center solely because of his handicap. Subsequently, the court ruled that he was an otherwise qualified applicant for the learning center and was denied admission solely by reason of his status as a hepatitis B carrier.[134] The learning center personnel contended that the plaintiff's aggressive behavior posed a

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132. Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987). *See* Board of Educ. of City of Plainfield v. Cooperman, 523 A.2d 655 (N.J. 1987).

133. Kohl v. Woodhaven Learning Center, 672 F. Supp. 1221 (W.D. Mo. 1987). *See* School Bd. of Nassau County, Florida v. Arline, 107 S. Ct. 1123 (1987) (individual who was physically impaired by a contagious disease is a handicapped person within the meaning of section 504); see text with note 139, *infra*.

134. Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226 (W.D. Mo. 1987). *See* Kohl v. Woodhaven Learning Center, 676 F. Supp. 945 (W.D. Mo. 1987) (defendants not entitled to new trial).

substantial risk of spreading hepatitis B throughout the facilities. The court, however, concluded that since the plaintiff was "otherwise qualified," any risk of transmitting hepatitis B could be eliminated by inoculating the limited staff who would work with the plaintiff. According to the court, this accommodation would not impose an undue financial burden on the learning center.

Compensatory education was unavailable under section 504 in a California case. The Ninth Circuit Court of Appeals ruled that the eleventh amendment shielded the state from monetary liability.[135] Since the court found no distinction between a request for compensatory education and a request for monetary damages, California was held to be immune from liability.

In a higher education case, a student with retinitis pigmentosa (disease that causes loss of peripheral vision and loss of sight in reduced light) was not "otherwise qualified" for an optometry program because he could not fulfill the clinical proficiency requirements due to his handicap.[136] Waiver of the clinical requirement was found to be a substantial or fundamental, rather than reasonable, modification.[137] Section 504 does not require accommodations in programs that could pose potential danger to the public.

Employees

The cases reported in this section interpreting the Rehabilitation Act involve public employees in general rather than merely school personnel. The issues litigated in 1987 include: What is an impairment under the Act? What constitutes an otherwise qualified handicapped person? What is reasonable accommodation?

Handicapped Persons. To invoke the protections of the Rehabilitation Act employees must first establish that they are "handicapped" within the meaning of the Act. As defined by Congress, a handicapped individual is any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[138] In reviewing claims, courts first determine if there is an impairment, and then assess whether it substantially limits a major life activity.

In 1987 the United States Supreme Court in *School Board of Nassau County, Florida v. Arline* held that a teacher suffering from the contagious disease of tuberculosis was a "handicapped individual" within the

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135. Alexopulos v. San Francisco Unified School Dist., 817 F.2d 551 (9th Cir. 1987).
136. Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987).
137. *Id.* at 673.
138. 29 U.S.C. § 706(7)(B).

meaning of section 504 of the Rehabilitation Act.[139] Applying the Act's regulations, the Court found that Arline had a physical impairment (physiological condition affecting her respiratory system) and the impairment limited a major life activity (work). An earlier period of hospitalization further established a record of impairment as identified in the regulations. The school district argued that Arline was not terminated from employment because of diminished physical capabilities but because of the threat she posed to the health of others. The Court disagreed with the contention that the contagious effects of a disease can be distinguished from the physical effects of the disease. Justice Brennan, writing for the majority, asserted that since both the contagiousness and the physical impairment resulted from the same condition "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."[140]

The *Arline* case was closely observed by legal experts regarding the direction it might provide in defining the rights of AIDS victims. Clearly, an individual would be handicapped if the disease resulted in diminished physical or mental capabilities. The Supreme Court, however, expressly declined to comment on whether a person who is simply a carrier of a contagious disease without having a physical impairment could be considered handicapped. As noted above, a Missouri federal district court relying on the *Arline* analysis reasoned that a student with hepatitis B was handicapped because he was "regarded as having an impairment."[141] The District of Columbia federal district court in reviewing a challenge to the testing of foreign service employees for AIDS held that persons infected with the Human Immunodeficiency Virus (HIV) are handicapped individuals.[142] They are clearly perceived as handicapped and, furthermore, a large number of the carriers are physically impaired.

In 1986 an individual who alleged that he was denied a job because of his transvestite lifestyle was found, on a motion to dismiss, to have stated a claim under the Rehabilitation Act.[143] The District of Columbia federal district court later, however, found that the rejection of employment was based not on the fact that the plaintiff was a transvestite but on the supervisor's perception that he was a homosexual, which is not a

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139. 107 S. Ct. 1123 (1987).

140. *Id.* at 1128.

141. Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226 (W.D. Mo. 1987); see text with note 133, *supra*.

142. Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987).

143. Blackwell v. United States Dept. of Treasury, 656 F. Supp. 713 (D.D.C. 1986). *See* Blackwell v. United States Dep't of Treasury, 639 F. Supp. 289 (D.D.C. 1986); *See* The Yearbook of School Law 1987 at 140.

handicap. Recovery was barred because the supervisor was unaware of the handicap.

A Pennsylvania employer asserted that a discharged employee with transitory back pain was not a handicapped individual. The federal district court stated that impairments must be determined on an individual basis, not in the abstract.[144] Because the employee suffered substantial pain and it affected most aspects of her life (work, walking, standing, sitting, etc.), she was found to be a handicapped individual.

Reasonable Accommodation for Otherwise Qualified Individuals. To establish a cause of action under the Rehabilitation Act, handicapped persons must establish that they are "otherwise qualified" for the position sought and that they were excluded from the position solely by reason of their handicap. An "otherwise qualified" handicapped person is one who can perform the essential functions of a position with "reasonable accommodation."

While the Supreme Court found that the teacher in *Arline* was a handicapped individual, she was entitled to relief only if otherwise qualified.[145] The Court recognized that "a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[146] To assess whether an individual with a contagious disease is otherwise qualified for employment, the Court advanced guidelines proposed by the American Medical Association. These steps include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities that disease will be transmitted and will cause varying degrees of harm.[147]

The Court further stated that courts generally should defer to the reasonable medical judgments of public health officials. The case was remanded to the district court to determine if Arline was otherwise qualified.

Legitimate physical requirements of a position must be considered in determining whether a person is otherwise qualified. A federal district court ruled that a criminal investigator who suffered from epilepsy

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144. Perez v. Philadelphia Housing Auth., 677 F. Supp. 357 (E.D. Pa. 1987).
145. School Bd. of Nassau County, Florida v. Arline, 107 S. Ct. 1123 (1987).
146. *Id.* at 1131 n.16.
147. *Id.*

could not meet the physical requirements of the position.[148] The job required the use of firearms, apprehension of suspects, and day and night surveillance. Under the circumstances, he could not safely perform the essential functions of the job. Similarly, a four feet, five inches tall postal service employment applicant (achondroplastic dwarfism) had limited reach and was not qualified for a distribution clerk position.[149] The employer was not required to accommodate the handicap because of safety and efficiency problems. An individual who required the use of bioptic lens to satisfy visual acuity standards was not otherwise qualified for a driver's license.[150] Any accommodation was deemed to render the potential driver unsafe to drive. In a case challenging mandatory testing of foreign service employees for AIDS, HIV-infected persons were found to be handicapped individuals but not to be otherwise qualified for foreign service duty because of the greater risk of infection and the lack of medical care at foreign posts to treat problems that might arise.[151]

A Pennsylvania federal district court ruled that an employer violated the Rehabilitation Act by failing to provide minimal, inexpensive accommodations for an employee who sustained back injuries but was otherwise qualified.[152] An individual whose bus driver's license was recalled after a heart attack established that he was otherwise qualified to be a driver after corrective surgery. A Pennsylvania commonwealth court remanded the case for a determination of whether accommodating the individual would impose a burden on the department of transportation or compromise essential safety.[153] An employer met its burden with evidence that it made reasonable accommodations for a discharged blind employee, such as readers, special equipment and office space, and a reduced workload. The federal district court emphasized that the employer is not required to provide an individual with every accommodation requested, only reasonable accommodations to enable the employee to perform the essential functions of the position.[154]

Reasonable accommodation has not generally included reassignment to other positions. A postal service employee argued that his handicap necessitated transfer to permanent light duty to accommo-

148. Salmon Pineiro v. Lehman, 653 F. Supp. 483 (D.P.R. 1987).
149. Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987).
150. Sharon v. Larson, 650 F. Supp. 1396 (E.D. Pa. 1986). *See* Knowles v. Postmaster Gen., 656 F. Supp. 593 (D. Conn. 1987) (individual who did not take an employment test was not otherwise qualified).
151. Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987).
152. Perez v. Philadelphia Housing Auth., 677 F. Supp. 357 (E.D. Pa. 1987).
153. *In re* Stober, 524 A.2d 535 (Pa. Commw. Ct. 1987).
154. Carter v. Bennett, 651 F. Supp. 1299 (D.D.C. 1987).

date his needs. The Fourth Circuit rejected the claim, stating that "[t]he case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment."[155] Moreover, in this case the court noted that the employer could not reassign the employee because of the rights of other employees under the collective bargaining agreement.

OTHER ISSUES

The Eighth Circuit confronted the question of whether the Rehabilitation Act prohibits discrimination in the handling of an employee salary continuation program and health and dental benefits when a handicapped individual is no longer able to work.[156] Section 504 applies only to "otherwise qualified handicapped individuals." According to the Supreme Court, such an individual is "one who is able to meet all of a program's requirements in spite of his handicap."[157] Relying on this interpretation, the appellate court concluded that section 504 prohibits discrimination only within an employment relationship in which a handicapped employee is able to do his job.

A regulation requiring blood and urine tests of railway employees after certain accidents or fatal incidents was not found to violate the Rehabilitation Act.[158] The plaintiffs maintained that the dismissal of handicapped workers who could perform their jobs despite drug or alcohol use constituted discrimination. In rejecting the discrimination claim, the Ninth Circuit noted that the regulation did not prescribe dismissal and only alcoholics and drug abusers whose problems are under control are protected by the Act.

For section 504 restrictions to apply to an employer, the program or activity must receive federal financial assistance. The Seventh Circuit examined an institution's liability when funds are nonearmarked.[159] In this case, a city had received general revenue-sharing funds but had not allocated any funds to the fire department. Under these circumstances, the court held that the department was not subject to the anti-discrimination provisions of the Rehabilitation Act. The court did caution that this determination was in the context of an employer's use of revenue-sharing funds: "When the federal government furnishes [nonearmarked]

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155. Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). *See* Davis v. United States Postal Serv., 675 F. Supp. 225 (M.D. Pa. 1987) (reassignment not required but cannot deny opportunities reasonably available under existing employment policies).

156. Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987).

157. *Id.* at 771, *quoting* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

158. Railway Labor Executives' Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988).

159. Foss v. City of Chicago, 817 F.2d 34 (7th Cir. 1987).

aid to an institution, section 504 may require that the entire institution be treated as the 'program,' thereby rendering all of its programs and activities subject to section 504 regardless of how the institution actually allocates the funds."[160] The Rehabilitation Act was not found to be applicable to a hospital holding company, even though individual hospitals within the group received federal aid in the form of Medicare and Medicaid.[161] The Kansas federal district court concluded that to be a recipient an employer must receive direct financial assistance.

160. *Id.* at 37.

161. Eivins v. Adventist Health System/Eastern & Middle Am., 651 F. Supp. 340 (D. Kan. 1987).

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TORTS

William J. Evans, Jr.

Introduction / 139
Negligence / 140
  Student Injuries / 140
    Off School Property and After School Hours / 140
    School Settings During School Hours / 141
    En Route to and from School / 146
    School Buildings and Grounds / 149
    School-related Activities / 149
Educational Malpractice / 150
Negligence Defenses / 151
  Immunity / 151
    Common Law (Governmental Immunity) / 151
    Statutory Immunity / 153
  Other Defenses / 155
    Notice of Claim / 155
    Comparative Negligence / 157
Liability Insurance / 158
Employee Injuries/Workers' Compensation / 159
Assault and Battery / 164
Defamation / 164
Tortious Interference with a Contract / 166
Products Liability / 167
Intentional Infliction of Emotional Distress / 168
Constitutional Torts / 170
  Student Initiated Cases / 170
  Employee Initiated Cases / 174

INTRODUCTION

The purpose of tort law is to provide remedies to individuals for harm which resulted from the unreasonable conduct of others. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most

actions, which are predicated on the principle that individuals are responsible for the consequences of their conduct.[1] The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, trespass, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.[2]

Most of the more common torts developed historically and have been recognized for centuries. But tort law is not static and the emphasis on the type of duty owed by one individual to another shifts. For example, the areas of constitutional and educational malpractice torts have emerged relatively recently in school law. Yet, educational malpractice cases are rapidly disappearing, while there has been a steady increase in litigation involving constitutional torts.

This chapter examines those cases reported during 1987 which involved tort claims within the school context. Cases included involve school officials, employees, and students. Torts arising out of physical education and intramural sports participation are included, but those involving interscholastic or intercollegiate sports participation are not included as they are discussed in a separate chapter.

NEGLIGENCE

The most common tort alleged to have been committed by school personnel is negligence. Such a charge can result when an improper act, or a failure to act, causes injury to another person. For negligence to exist, the person causing the injury must fail to exercise a standard of care commensurate with the risks involved and the duty owed to the injured party.

There must be a causal relationship between the alleged negligent conduct and the injury sustained. In negligence cases, questions of law are determined by judges, while questions of fact are decided by juries.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students resulted in a variety of lawsuits with varying outcomes.

Off School Property and After School Hours. Whether a

1. *See generally*, W. Prosser, Law of Torts (4th ed. 1971).
2. *See* M. McCarthy & N.H. Cambron-McCabe, Public School Law (1987).

school district can be held liable for injuries suffered by a student off school property and after school hours was examined in a California case.[3] A teacher stopped his van near a group of boys to determine if they were engaged in any improper conduct. As he pulled away, one of the students who had climbed onto his bumper fell injuring his head. In affirming the trial court's summary judgment for the district, the court of appeals found no duty owed by the district to the student. The student was not on his way to or from school, and the fact that the teacher initiated contact with the boys did not impose liability upon his employer.

School Settings During School Hours. Two cases involved injuries to students which occurred while the teacher was out of the classroom. A New York student, who was assaulted by another student, brought an action for damages against the school district.[4] During the approximately ten minutes the teacher was gone, a student from another class entered the room and starting fighting the plaintiff. During the course of the fight the student threw a desk at the plaintiff causing him serious physical injury. The trial court's dismissal of the action was affirmed by the appeals court. The complaint was found to have failed to state a cause of action as it did not allege that the school knew or should have known that the student who assaulted the plaintiff had a history of violent behavior which would pose a threat to other students.

A fourth grade student in Illinois brought a personal injury action against his school, principal, and teacher in connection with an injury where the student lost the sight of one eye.[5] The accident took place in the classroom while the teacher was in the hall supervising the movement of her students from the gymnasium area to the classroom. The circuit court entered judgment on a jury verdict in favor of the teacher, school, and principal. The court of appeals affirmed the decision recognizing that a teacher cannot supervise every child at all times while in school. There was no history of poor behavior by students when the teacher was briefly away from the classroom, and the teacher was following her normal course of conduct. In affirming the decision, the court pointed to the tremendous burden that would be imposed by a different decision.

Two cases involved supervision of students during their lunch period. In Florida, a student who was beaten by other students while outside his school cafeteria, brought suit for injuries against the school

3. Torsiello v. Oakland Unified School Dist., 242 Cal. Rptr. 752 (Ct. App. 1987).
4. McLoughlin v. Holy Cross High School, 521 N.Y.S.2d 744 (App. Div. 1987).
5. Albers v. Community Consol. No. 204 School, 508 N.E.2d 1252 (Ill. App. Ct. 1987).

board, principal, and teacher.[6] The trial court dismissed the complaint and the student appealed. The court of appeals upheld the dismissal of the action against the principal and teacher, but reversed concerning the school board. The complaint alleged the negligent breach of the duty to supervise by asserting that no teacher was posted to keep order in the cafeteria, and that the beating was near enough to alert a teacher if one had been posted. The school board argued that how and where to disperse the school's limited supervisory personnel was discretionary and not actionable. The court failed to recognize that position as the complaint did not challenge where the limited personnel would be, but alleged that no supervisory personnel were present at all. In remanding this portion of the action for trial, the court pointed to the board's common law and statutory duty to supervise students.

In the second instance, the parents of a Louisiana special education student brought suit against the school board on behalf of their daughter.[7] At the time of the accident the fourteen-year-old student had a mental age of six years, with motor skills development categorized as four years, two months. The accident occurred while the student was standing in a breezeway adjacent to the school's lunchroom and was bumped by two nonhandicapped students engaged in horseplay. The trial court found the school board at fault for creating an unreasonable risk of harm when the handicapped student was allowed to travel alone near a concession stand where horseplay was common. The court of appeals reversed the decision explaining that the school board was required by law to place the student in the least restrictive program. The area where the accident occurred was determined to be well supervised, and the accident happened so quickly that even one-on-one supervision would not have prevented the accident.

A New York trial court found a school district 75% at fault for an injury sustained during recess by a fifth-grade student. The appellate court reversed that decision finding that the plaintiff failed to establish a prima facie case.[8] The injury took place during a game in which children ran and tried to push through a line of other children linked hand to hand. Although the game was specifically prohibited, it had been played for a few moments before the injury occurred. At the time of the accident, five school aides and one teacher were on duty supervising 250 to 275 children. The court saw the supervision as reasonable and determined that the school personnel had no actual or constructive notice that

6. Comuntzis v. Pinellas County School Bd., 508 So. 2d 750 (Fla. Dist. Ct. App. 1978).
7. Brooks v. Saint Tammany Parish School Bd., 510 So. 2d 51 (La. Ct. App. 1987).
8. Totan v. New York City Bd. of Educ., 519 N.Y.S.2d 374 (App. Div. 1987).

the game was in progress. Therefore, there was no reasonable opportunity to prevent its continuance prior to the student's injury.

The issue of foreseeability was at the center of a case which was brought on behalf of a fourth-grade student who was abducted from school and raped.[9] The trial court's judgment for the student was appealed by the school district. Testimony showed that school security was deficient, with an open rear gate, broken doors, malfunctioning intercom, and the presence of adult males who freely roamed throughout the school. These factors, plus a history of violent activity in the surrounding neighborhood, were seen by the court of appeals as enhancing the foreseeability of dangers from intruders. This, the court explained, created a duty on the part of district officials to protect the students from such activity.

In New York, a high school student sought to recover damages for injuries caused when he was assaulted by armed individuals on the front steps of his school.[10] The trial court's rejection of that claim was affirmed by the court of appeals. In being outside the school building at the time of the incident, the student was in violation of rules promulgated for the protection of students. The measures taken to insure school safely were not found to have created a special duty to him.

The four cases which involved injuries related to gym or physical education classes had a variety of outcomes. An eighth grade student in New York, who was injured by another student while participating in a wiffleball game during gym class, brought suit against the school district alleging negligent supervision.[11] The Supreme Court, Appellate Division upheld the lower court ruling absolving the district of liability. The court recognized that a school cannot be an insurer of student safety, yet it is liable for a foreseeable injury proximately related to the absence of supervision. In this instance, the student causing the injury did not have a disciplinary record showing such a strong propensity toward violence as to warrant special supervision. The teacher was only twenty-five feet from where the altercation took place and he took immediate action. Since the school district was not found to be negligent, the court did not need to examine the issue of proximate cause.

A Michigan high school student brought an action against his school district and physical education instructor for injuries sustained during

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9. District of Columbia v. Doe, 524 A.2d 30 (D.C. 1987). *See* Jones v. City of Albany, 513 N.Y.S.2d 554 (App. Div. 1987) (school district's motion for summary judgment denied as evidence presented questions of fact on whether a student's conduct and resulting injuries were reasonably forseeable).

10. Salmond v. Board of Educ., 517 N.Y.S.2d 90 (App. Div. 1987).

11. Hanley v. Hornbeck, 512 N.Y.S.2d 262 (App. Div. 1987).

physical education class.[12] The student was thrown to the ground and seriously hurt during a touch football game. The plaintiff alleged that the instructor failed to adequately supervise and instruct the class, and failed to intervene when the players began to use excessive force. Specifically, it was alleged that the instructor was reading his morning newspaper rather than supervising the class. The circuit court found in favor of the school district and teacher, and the plaintiff appealed. The court of appeals reversed the holding regarding the teacher finding his lack of supervision to be a ministerial act and therefore not protected from tort action.

While enrolled in a high school swimming class, a Pennsylvania student struck his head on the bottom of the pool after attempting a dive at the shallow end. The accident left him paralyzed, and was the basis for his action against the swimming instructor and school district.[13] The Supreme Court of Pennsylvania reversed the trial court's decision against the student and remanded the case for a new trial. In particular, the court held that the trial judge abused his discretion by permitting opinion evidence by an expert witness. The expert's testimony stated that the plaintiff was completely responsible, and addressed the totality of the evidence. The court saw that responsibility as more appropriate for the jury.

The *in loco parentis* immunity of an Illinois school was at issue in a case involving a third-grade student injured during physical education class.[14] The school board was charged with breaching its duty to exercise reasonable care by negligently furnishing baseball bats intended for use by adults. These were alleged to be too heavy to be safely held and swung by children. The circuit court dismissed the action against the school board, and the student appealed. Reversing that decision and remanding the case for trial, the appeals court expressed a concern for relieving school boards of liability for acts which do not fall clearly within the doctrine of educational immunity.

A high school teacher in Oregon, who was convicted of deviate sexual intercourse with a person under sixteen years of age, was sentenced to a prison term of five years. Although the court of appeals affirmed the decision, the Supreme Court of Oregon reversed and

12. Hyman v. Green, 403 N.W.2d 597 (Mich. Ct. App. 1987). *See also* Merkley v. Palmyra-Macedon Cent. School Dist., 515 N.Y.S.2d 932 (App. Div. 1987) (whether a teacher's actions, standing fifteen yards away from a group throwing a shot-put and supervising two activities at the same time, proximately caused a student's injury was seen as requiring a jury trial).

13. Kozak v. Struth, 531 A.2d 420 (Pa. 1987).

14. Ausmus v. Board of Educ., 508 N.E.2d 298 (Ill. App. Ct. 1987).

remanded the case for a new trial.[15] The court held that expert testimony concerning methods that a person who sexually abuses children will use to get close to the victim was not admissible. However, the evidence of communications between the child's psychotherapist and the child should have been admitted as the psychotherapist-patient privilege cannot be a ground for excluding evidence regarding the cause of a child's abuse, or the abuse itself.

A New York teacher was convicted of sexual abuse and endangering the welfare of a child. The court of appeals upheld that decision, rejecting the plaintiff's claims of reversible error.[16] The plaintiff sought the right to question the investigating officers in an attempt to establish that they suggested or coerced the accusation against him. The court refused to allow this, finding the method in which the children were questioned to be a collateral issue. The use of photographs of the alleged victims were found admissible for the limited purpose of refreshing the jury's memory of their testimony.

In California, a child brought an action against the school district for sexual assault committed by her teacher.[17] The trial court dismissed the case and the plaintiff appealed. The appeals court reversed that decision recognizing the duty owed by the district to the student. The court pointed to the recent amendment to the state constitution which included the guaranteed right to safe schools, and the child abuse reporting law. Citing the great authority and trust given to teachers, governmental entities such as school districts were seen by the court as liable for intentional torts committed by their employees.

The mother of a child with cerebral palsey sought to envoke the concept of negligent discipline in an action brought against the school district, bus driver, principal, and nurse.[18] It was alleged that while the

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15. State v. Hansen, 743 P.2d 157 (Or. 1987). *See* Pesce v. J. Sterling Morton High School Dist. 201, 830 F.2d 789 (7th Cir. 1987) (school psychologist's substantive and procedural due process rights were not violated when school board disciplined him for failure to disclose suspected abuse of student by teacher).

16. People v. Hudy, 521 N.Y.S.2d 811 (App. Div. 1987).

17. Kimberly M. v. Los Angeles Unified School Dist., 242 Cal. Rptr. 612 (Ct. App. 1987). *But see* State v. Woodley, 746 P.2d 227 (Or. Ct. App. 1987) (second degree sexual abuse charge against girl's basketball coach is not supported by the touching of thigh area and area between female breasts); Scott v. Blanchet High School, 747 P.2d 1124 (Wash. Ct. App. 1987) (where parents could not recover for negligent hiring of teacher who became sexually involved with student); and Cohen v. Wales, 518 N.Y.S.2d 633 (App. Div. 1987) (where plaintiff claimed district negligently recommended a teacher for employment without disclosing alleged sexual misconduct eleven years earlier, the recommendation of a person for employment was not held a proper basis for such an action).

18. Hopkins v. Spring Indep. School Dist., 736 S.W.2d 617 (Tex. 1987). *See* Braun v. Board of Educ., 502 N.E.2d 1076 (Ill. App. Ct. 1986) (where board was not guilty of willful and wanton misconduct for failing to disseminate appropriate information about a student's epileptic condition).

student was unsupervised she was pushed into a stack of chairs and sustained a head injury. Help was not summoned and she was not sent to the nurse. Later, while riding home on the school bus, the student suffered severe convulsions. The mother claimed that the school personnel's gross negligence dramatically decreased the child's life expectancy. The trial court and court of appeals granted a summary judgment for the defendants. The Supreme Court of Texas agreed, rejecting the mother's broad interpretation of the term discipline under which it was claimed that the child was disciplined by submitting to the authority and control of her teacher, the school nurse, and other employees. In addition, there was no exception to the school district's immunity as the bus only provided the setting for the injury, and was not the proximate cause.

The issue presented in a New York case was whether a school district can be held liable for injuries incurred by a truant student who was involved in an automobile accident a considerable distance from the school at a time beyond normal school hours.[19] On the day in question the student reported late for school, received a pass to enter the detention room, and left the building without permission. The student spent much of the rest of the day joy-riding until the accident. The plaintiffs contended that the school district breached its duty of supervision, care, custody, and control by allowing the student to leave the building. In addition, the district's failure to report the student's unauthorized absence to his mother or law enforcement officials, and failure to maintain adequate attendance and/or truancy control policies were cited. In granting the school district a summary judgment, the court found that nothing short of a prison-like atmosphere could have prevented the student from leaving the school, and that it would be improper to mandate that a school district employ such measures.

En route to and from School. Five cases involved accidents involving students crossing streets to get to, or leaving from, a school bus. In Georgia, a ten-year-old student was struck and killed as he was crossing a heavily travelled highway to get to a bus stop. In the wrongful death action brought by the child's parents, the trial court granted a summary judgment in favor of the liability insurer of the school board. The court of appeals reversed that decision and determined that there was a question of fact as to whether the child's attempt to cross the highway occurred in the process of "loading" the bus.[20] The court

19. Palella v. Ulmer, 518 N.Y.S.2d 91 (Sup. Ct. 1987).

20. Cawthon v. Waco Fire & Casualty Ins. Co., 358 S.E.2d 615 (Ga. Ct. App. 1987). For another case involving the judgment of a bus driver see Knickles v. United Cab Co., Inc., 505 So. 2d 114 (La. Ct. App. 1987) (driver whose school bus struck a parked cab was not negligent in making a right turn when faced with a sudden emergency).

pointed to the fact that the driver had previously told the student that he must be outside waiting for the bus, and that if he was not, the bus would leave without him. Furthermore, a question of fact existed as to whether the driver explicitly ordered the child to cross the highway prior to the arrival of the bus.

A wrongful death action was brought on behalf of an eleven-year-old Minnesota student who was killed while crossing the street after disembarking a bus.[21] The city bus was operating under a contract between the school district and the transit authority. Eligible students lived more than two miles from school and paid no fare. Noneligible students, including those who lived less than two miles from school, were required to pay a fare. The contract was seen as contemplating the transportation of both eligible and noneligible students because of the location of bus stops within the two-mile limit. The deceased lived within the two-miles. The district court decision for the defendants was reversed by the court of appeals. The bus had been operating without a stop signal arm, pre-warning flashing amber lights, or flashing red signals as required by law. The court found that by acting as a school bus, the safety feature requirements must be met. The district's duty to the students within the two-mile limit was acknowledged as it could be reasonably anticipated that those students would use the bus. No distinction was seen between the paying and nonpaying students which would relieve the school district of liability.

Parents of a student who was injured while trying to cross the road to get to his school bus, brought an action against the transportation division of the state board of education, assistant state superintendent of transportation, school district, bus driver, and bus company.[22] The New Mexico district court granted summary judgment in favor of the state defendants and school district. The court of appeals affirmed that portion of the decision which granted immunity to the state defendants. Since the state had no authority to employ the bus driver or to operate school buses, it had no liability for injury to the plaintiff who was struck by a school bus. Whether the school district was immune was determined to be a question for the jury. The issue of possible negligent operation of the bus by the driver, as well as possible contributory negligence by the student, were held to preclude a summary judgment for the defendant school district.

When a twelve-year-old New York girl missed her school bus, she was struck by an automobile as she hurried to a later stop on the bus route. In the student's action against the school district, the trial court

21. Jam v. Independent School Dist., 413 N.W.2d 165 (Minn. Ct. App. 1987).
22. Chee Owens v. Leavitts Freight Serv., 745 P.2d 1165 (N.M. Ct. App. 1987).

denied the district's motion for a summary judgment and the district appealed. In reversing that decision, the appeals court agreed that the district owed the student a duty of care. However, the court pointed out that care must be taken to avoid confusing duty, which is a question of law, with breach, which is a question of fact. In this instance no breach of duty was found as a school district is not an insurer of the safety of children as they travel to and from the place where the school bus picks up or discharges them. The court also rejected the contention that the district deviated from its policy by allowing students to board buses at more remote, less safe locations. There was no indication that the district directly communicated to parents that it had assumed a special duty to students at their assigned stops, and then breached that duty by allowing students to board at stops other than their own.[23]

After a child was injured while crossing a highway on the way to school, his father brought suit against the Pennsylvania borough and commonwealth. The trial court dismissed the complaint and the father appealed.[24] In affirming that decision, the appeals court held that the commonwealth had exclusive authority over the state highway, and therefore the borough had no duty to establish a school zone. Furthermore, the borough had no duty to warn or give notice to the commonwealth of any dangerous condition.

An Illinois high school student brought an action against her school district for injuries incurred while walking home from school.[25] The accident occurred as the plaintiff followed her usual route, which included a footpath from the end of the sidewalk along the crest of an embankment that had been constructed at the end of a running track which surrounded the football field. On the day in question, a fence used for crowd control during the football season was in place and blocked access to the footpath at the top of the embankment. At one point the plaintiff stepped onto the pavement and was struck from the rear by an automobile. Following a jury trial, judgment was entered for the student. On appeal by the school district, the appellate court found that no duty was owed to provide a safe place for pedestrians to walk where there was no sidewalk. The court disagreed with the plaintiff's contention that the school district had designed and constructed an unreasonably dangerous condition on its property. The fence itself was not seen as dangerous, and the fourteen-year-old plaintiff was determined to be old enough to appreciate the danger of stepping onto the pavement of a two-lane roadway. Furthermore, plaintiff was not en-

23. DiCerbo v. Raab, 516 N.Y.S.2d 995 (App. Div. 1987).
24. Walch v. Red Hill Borough, 532 A.2d 1238 (Pa. Commw. Ct. 1987).
25. Frakes v. Martin, 503 N.E.2d 556 (Ill. App. Ct. 1987).

gaged in a school activity, and was going home by a route of her own choosing.

School Buildings and Grounds. The Supreme Court of Oregon presented an analysis of the concept of foreseeability in a case arising out of the assault and rape of a fifteen-year-old student.[26] The girl was assaulted as she was about to enter the school building almost an hour before school was to begin. The court determined that whether the school district was negligent in not providing supervision for students who arrived before school began, or for failing to issue precautionary warnings, was a question for the jury. The court cited the school's duty of supervision, not only to a student whose conduct injures the plaintiff, but to students who are injured by others or by themselves. "Negligence toward a student," the court explained, "is tested by an obligation of reasonable precautions against foreseeable risks beyond those that might apply to other persons."[27] It was concluded that a sensible school administrator would have taken precautions by providing either supervision or at least a warning to students and their parents of the absence of supervision before school. The attack was seen as particularly foreseeable as there was evidence of a sexual assault on a woman on school grounds fifteen days before the attack on the plaintiff.

In Illinois, a student was injured in the boy's gymnasium when he fell against an unprotected concrete riser. An action alleging negligence against the school district was brought by the student's parents.[28] The circuit court dismissed the action, and the parents appealed. The court of appeals reversed that decision and remanded the case for trial. The court saw the alleged negligence as separate from supervision and related to the furnishing of defective equipment. Therefore, the district became liable for furnishing equipment which, in the exercise of ordinary care, it should have known could cause injury to the plaintiff.

School-related Activities. A West Virginia student fell from bleachers knocking a teacher to the floor injuring her. The teacher brought a personal injury action against the student, who subsequently brought a third-party action against the school district alleging willful, wanton, and reckless misconduct in failing to install detachable guard

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26. Fazzolari v. Portland School Dist., 734 P.2d 1326 (Or. 1987). *See* Toure v. Board of Educ., 512 N.Y.S.2d 150 (App. Div. 1987) (where the matter of whether a board's duty to provide schoolyard supervision between 8:00 a.m. and 8:25 a.m. was deemed a question for the jury).

27. *Id.* at 1338.

28. Prest v. Sparta Community Unit School Dist., 510 N.E.2d 595 (Ill. App. Ct. 1987). *See* Gordon v. Board of Educ., 510 N.Y.S.2d 824 (Civ. Ct. 1987) (where student who was injured when he placed his hands on the wired glass panel of a high school fire door failed to have the amount of his judgment raised as the court did not have jurisdiction).

rails on the sides of the bleachers.[29] The circuit court found for the student on the third-party claim, and the board of education appealed. In reversing that decision, the appeals court agreed that the failure to install the railings was arguably negligent, but did not constitute the kind of gross negligence necessary to hold the board liable.

A minor who was served alcohol at a series of graduation parties brought suit against two hosts and a hotel after falling from a balcony and sustaining serious injuries.[30] The fundamental question was the extent of social host liability for the service of intoxicating beverages to a minor. The Supreme Court of Pennsylvania found that adults do have a duty of care, and that duty is breached with the service of any alcohol, not just an amount sufficient to intoxicate the minor.

A Minnesota vocational school student was injured in an automobile accident after leaving a school sponsored "Bowl-A-Thon." The student's action against the school district and its employees claimed there had been negligent supervision of intoxicated students.[31] In upholding the decision of the lower court, the court of appeals explained that Minnesota's Civil Damages Act precluded actions based on negligent supervision.

EDUCATIONAL MALPRACTICE

The attempt to draw a distinction between educational malpractice and educational negligence was at issue in a New York case.[32] After a kindergarten student was administered an IQ test, she was placed in a class for retarded children. Three years later the child was re-diagnosed as deaf and placed in the proper class. The action against the school district alleged willful and wanton negligence. The court of appeals reversed the lower court's decision and refused to recognize educational negligence as an independent cause of action. Seeing the claim as one of educational malpractice, the court pointed out that based on public policy considerations, courts have uniformly refused to enter the classroom on such claims.[33]

In New Mexico, parents brought suit for damages following a

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29. Miller v. Gibson, 355 S.E.2d 28 (W. Va. 1987).

30. Orner v. Mallick, 527 A.2d 521 (Pa. 1987).

31. Beseke v. Garden Center, Inc., 401 N.W.2d 428 (Minn. Ct. App. 1987). *But see* Westbrook v. Board of Educ., 724 S.W.2d 698 (Mo. Ct. App. 1987) (where the court found a regulation requiring teachers to use reasonable care to look out for the safety of students during a trip was mandatory and not unduly vague).

32. DeRosa v. City of New York, 517 N.Y.S.2d 754 (App. Div. 1987).

33. *Id.* at 933. *See* Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1987); Hoffman v. Board of Educ., 424 N.Y.S.2d 376 (N.Y. 1979); Donohue v. Copaigue Union Free School Dist., 418 N.Y.S.2d 375 (N.Y. 1979).

teacher's alleged distribution of marijuana to students. The trial court dismissed the action, and the parents appealed. The plaintiff's alleged educational malpractice, negligence in hiring and retaining the teacher, breach of contract, and a violation of constitutional rights. In affirming the lower court decision, the court of appeals addressed a number of issues.[34] Immunity was not found to have been waived involving the hiring and retaining of the teacher. Educational malpractice, if it exists, was seen as a form of negligence over which the court would have no jurisdiction without a waiver of immunity. The right to a free public education was not found to create a contractual relationship. The only authority cited by the plaintiffs were the writings of John Locke and Thomas Hobbes. The court did not view the social contract exposed by these early thinkers to translate to an enforceable contract between the government and its citizens. The fact that citizens pay taxes, was not found to create a contractual relationship. There are those who pay taxes but have no children, or have children who attend private schools. Finally, the civil rights claim was rejected because there was no allegation that the defendant, through custom of policy, ever sanctioned the distribution of marijuana to its students.

NEGLIGENCE DEFENSES

Immunity

The most commonly used defense has been governmental (sovereign) immunity. Traditionally, courts have been reluctant to disturb that defense as school districts are state agencies created by state law to perform a governmental function. Increasingly, however, there have been legislative and judicial inroads restricting the use of this defense.

Common Law (Governmental Immunity). A Missouri student who had been assaulted by her classmates brought a personal injury action against the school district. The circuit court granted the district's motion to dismiss the case. The court of appeals affirmed that decision, rejecting the idea that the district was a municipal corporation. The district was seen as an arm of the state and therefore entitled to immunity.[35]

In Pennsylvania, a person attending a luncheon at a high school

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34. Rubino v. Carlsbad Mun. School Dist., 744 P.2d 919 (N.M. Ct. App. 1987).

35. Taylor v. Klund, 739 S.W.2d 592 (Mo. Ct. App. 1987). In Krikorian v. Barry, 242 Cal. Rptr. 312 (Ct. App. 1987) a psychologist who was statutorily required to report suspected cases of child abuse, was immune from liability arising from the collection of data and observation and examination of suspected victims of child abuse. In Camp v. Sarratt, 354 S.E.2d 390 (S.C. 1987) release of claim against the state of South Carolina served to preclude an action against the school district.

brought an action for injuries suffered after ingesting a piece of plastic which was in his food. The school district had rented out the facility and agreed to serve lunch. The trial court found the district immune from liability, and that decision was upheld on appeal.[36] Those findings rejected the arguments that the school district was performing a proprietary rather than a governmental function, and that by serving food the district was strictly liable.

A New York City teacher sought to hold the board of education liable for negligently failing to provide security resulting in assault and robbery.[37] The public address system was not functioning in his room and therefore he and his students failed to hear that classes had been dismissed because of the Thanksgiving holiday. The teacher alleged that he relied upon the presence of security guards, who were allegedly absent from their posts at the time of the attack. In affirming the trial court's decision, the New York Supreme Court, Appellate Division explained that a governmental agency cannot be held liable for negligent acts committed in the performance of its governmental function, absent a special relationship between the injured party and the public entity. The plaintiff was unable to demonstrate that the security measures at the school were intended specifically for him, or for a class of persons of which he was a member.

A South Dakota teacher brought action against his school district, superintendent, principal, and a parent asserting tort claims arising from three incidents.[38] The teacher claimed that (1) the principal intentionally prevented him from leaving a meeting where the parent assaulted him, thus subjecting him to a threatening environment, (2) the superintendent threatened and physically detained him during a meeting concerning the teacher's evaluation, and (3) the superintendent made defamatory statements about him in the presence of students. The circuit court entered a summary judgment in favor of the school district, superintendent, and principal. The Supreme Court of South Dakota reversed that decision and remanded the case for trial by determining that the principal and superintendent could not be shielded by immun-

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36. Amacher v. Clarion Area School Dist., 530 A.2d 525 (Pa. Commw. Ct. 1987). *But see* Shultz v. Brentwood, 725 S.W.2d 157 (Mo. Ct. App. 1987) (where the city was not entitled to sovereign immunity as running its day care center and preschool were not found to be governmental duties, but rather propriatary in nature since they were operated for profit).

37. Weinstein v. Board of Educ., 511 N.Y.S.2d 882 (App. Div. 1987).

38. Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987). Another case which featured a successful immunity defense was Miller v. Emelson, 520 A.2d 913 (Pa. Commw. Ct. 1987) where a malicious prosecution action, brought against a school district and its directors following a teacher's strike, was barred by general immunity.

ity. Their alleged acts were seen as intentional torts not offered such protection.

An adult evening student in New Jersey was struck by an automobile while crossing a road to get to the school. Her car had been parked across the street because of the limited parking on school property. The action she took against the school board was settled by the trial court with a summary judgment for the board, a decision which was affirmed by the court of appeals.[39] Using a novel approach to governmental tort liability, the plaintiff claimed that the school property itself was in a dangerous condition because of its limited number of parking spaces. The contention was that it was reasonably foreseeable that an adult evening student en route to class would park across the street and from there jaywalk across the road and be struck by a vehicle. Rejecting that argument, the court held that government liability for a dangerous condition of property cannot be premised upon a dangerous activity by a third party somewhere off the property.

A woman who was descending aluminum risers at a city convention center in order to be seated at a high school graduation, fell and sued the board of education and the city for her injuries.[40] The New York trial court dismissed the action and the plaintiff appealed. The court of appeals allowed the action against the city, but held that the school district could not be held liable. The district had leased the premises and therefore was not responsible where it had no control of the premises. No duty was found to warn of an alleged defective or dangerous condition.

Statutory Immunity. A New Mexico student who was struck and injured by a fellow student while on school property, brought suit against the school board.[41] The district court denied a motion to dismiss the action and the board appealed. Citing the provisions of the Tort Claims Act, the court of appeals reversed that decision. The plaintiff had contended that negligent supervision of students was an exception to the board's immunity. This claim was denied since the portion of the Tort Claims Act relied upon by the plaintiff only waived immunity for damages resulting from the negligent operation or maintenance of a building. Where the areas of waiver of immunity are specifically presented, the court explained, they have no authority to read other exceptions into the statute.

In Pennsylvania, a man who was injured on school property brought

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39. Ross v. Moore, 533 A.2d 398 (N.J. Super. Ct. App. Div. 1987).

40. Elmlinger v. Grand Island Board of Educ., 518 N.Y.S.2d 257 (App. Div. 1987).

41. Pemberton v. Cordova, 734 P.2d 254 (N.M. Ct. App. 1987). *See also* Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290 (Tex. Ct. App. 1987) (school district immune from liability for injury to student during cheerleader practice).

an action against the school district.[42] The accident took place during a community day celebration when, while helping out on a hayride, he fell and was seriously injured. The trial court upheld the school district's assertion that (1) the district did not exercise supervision, direction, or control over the community day affairs, and (2) the district was immune from tort liability. That decision was affirmed by the Commonwealth Court of Pennsylvania explaining that liability for negligence is imposed only when government owned property is made unsafe for the activities for which it is regularly used. A student who injured his eye while using a wood lathe in an industrial materials course brought suit against the school district. A Pennsylvania jury returned a verdict for the student and the district appealed.[43] At issue was whether the 800 pound lathe was an individual piece of equipment, or a part of the reality in which case its care, custody, and control would fall within the real property exception to governmental immunity. The appeals court reversed the earlier decision and ordered a new trial. The unbolted lathe, which was attached to the property by only electrical wire and gravity, had previously been moved to another classroom and was not held to be a fixture.

The decision by a trial court, that a school district was immune from liability for an accident which took place on school property, was reversed by a Pennsylvania appeals court.[44] A student, who was injured when another student struck her with his automobile, had sought exception to the school's immunity. The school district was alleged negligent with respect to design and maintenance of its streets, sidewalks, and traffic controls. In remanding the case for trial, the appeals court explained that there was no requirement that a physical defect be present in order to fall under the streets or sidewalks exception to immunity where defective design is alleged.

The administratrix of a child's estate brought action against the school district to recover damages for a child killed when he fell through a school skylight.[45] The twelve-year-old fell after he climbed onto a trash dumpster and then onto the school roof to retrieve a ball. Appeal was sought after the Pennsylvania trial court dismissed the complaint. The appeals court reversed that decision finding that, although the incident took place on Easter Sunday, the victim was not an intentional trespasser involved in an unforeseeable accident. The general use of the school yard was for recreational purposes, and it was open to neigh-

42. Carl v. Banks Engineering Co., 525 A.2d 877 (Pa. Commw. Ct. 1987).
43. Canon-McMillan School Dist. v. Bioni, 533 A.2d 179 (Pa. Commw. Ct. 1987).
44. Dorsch v. Butler Area School Dist., 525 A.2d 17 (Pa. Commw. Ct. 1987).
45. Stahl v. Cocalico School Dist., 534 A.2d 1141 (Pa. Commw. Ct. 1987).

borhood children after school and on weekends. For the purposes of a real property exception to the school's immunity, the conduct alleged in the complaint was seen as directly related to the condition of the property. Allegations were made relating to a physical defect in the skylight, and this together with the district's awareness of potential serious injury to children, stated a cause of action for an exception to governmental immunity. Thus the matter was remanded for further proceedings.

In Michigan, a sixteen-year-old student was learning how to use a milling machine during shop class when his gloved hand became caught in the unguarded rotary cutting mechanism severing a finger and nearly severing his thumb. The suit against the school sought a defective building exception to the school's governmental immunity. In affirming the trial court's decision for the school, the court of appeals held that classroom equipment used for instructional purposes is not a part of the reality.[46]

While a high school student in Texas was waiting to board her bus home, she was struck by an automobile driven by another student. In the action her father brought for damages, the district court entered a summary judgment for the school district.[47] On appeal, the father sought to establish the motor vehicle exception to the school's immunity. The court of appeals explained that to prevail the damages must have been proximately caused by the negligence of an employee acting within the scope of his authority and arising from the use of a motor vehicle. As the vehicle in this case was not owned or operated by any agent of the school district, that exception was not found to apply.

Also in Texas, a court of appeals reversed a trial court's summary judgment in an accident involving a school bus. There were material issues of fact as to whether a school bus operator had properly activated flashers to indicate that the bus was slowing before stopping to discharge school children. In remanding the case for trial, the court found sufficient evidence of acts which could fall under the motor vehicle exception to governmental immunity.[48]

Other Defenses

Notice of Claim. Defenses other than claims of immunity can apply to negligent tort actions. The timely notice of claim requirement is designed to allow defendants an opportunity to investigate a claim

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46. Velmer v. Baraga Area Schools, 403 N.W.2d 171 (Mich. Ct. App. 1987). *But see* Barbin v. State, 506 So. 2d 888 (La. Ct. App. 1987) (a student attending school for the deaf recovered for injuries suffered in woodworking class).

47. Heyer v. North East Indep. School Dist., 730 S.W.2d 130 (Tex. Ct. App. 1987).

48. Hitchcock v. Garvin, 738 S.W.2d 34 (Tex. Ct. App. 1987).

while the facts surrounding it are still recent. Failure to make a timely notice can be grounds for the dismissal of a complaint.

In South Carolina, a student brought an action against her former teacher for injuries sustained when a glass tube broke or exploded during a chemical experiment.[49] The state of South Carolina maintained an insurance policy which covered the teacher for personal liability. Although the teacher gave the suit papers to her principal, the school authorities failed to timely notify their attorney or the insurance company. The trial court refused the teacher's motion to vacate a default judgment as to liability. While the teacher's negligence in not answering was seen as excusable, the school board's lack of action was not. The court of appeals reversed that decision explaining the general rule that when an employee hands suit papers to his employer, and the employer fails to properly answer the papers, the courts grant relief to the defaulting defendant in the interest of trying cases on their merits.

Michigan school faculty members and their spouses brought an action against an engineering firm based upon physical injuries allegedly caused by the defective design, installation, and maintenance of the school's heating and ventilation system.[50] The court of appeals upheld the trial court's judgment for the engineering firm finding the action barred by the six-year statute of limitations. This limit was not seen to deprive the plaintiffs of their due process rights, even though the cause of their injuries was not discovered until after the period had run.

In California, a student and his parents brought action against the school district and teacher for sexual abuse.[51] The trial court granted a motion for nonsuit on the basis of failure to timely state a cause of action, and the plaintiffs appealed. The court of appeals reversed the motion holding that a cause of action based on the sexual assault of a minor by his teacher is deemed to accrue at the time the parent discovers or should have discovered the assault. Although the court was not aware of a case discussing delayed accrual of a cause of action for child sexual abuse, it stated that it cannot be law that a public school teacher could molest a minor student and successfully threaten the child long enough

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49. Roberts v. Peterson, 355 S.E.2d 280 (S.C. Ct. App. 1987).

50. Fennell v. John J. Nesbitt, Inc., 398 N.W.2d 4881 (Mich. Ct. App. 1986).

51. John R. v. Oakland Unified School Dist., 240 Cal. Rptr. 319 (Ct. App. 1987). *But see* Katz v. Rockville Centre Union Free School Dist., 516 N.Y.S.2d 289 (App. Div. 1987) (student failed to adequately explain the unreasonable delay in bringing the proceeding for leave to serve a notice of claim until nearly three years later); San Bernardino City Unified School Dist. v. Superior Court, 235 Cal. Rptr. 356 (Ct. App. 1987) (where a trial court's refusal to set a preferential trial date was upheld, even though the request was made before the expiration of a three-year limitation period); and Mulligan v. Farmingdale School Dist. No. 22, 519 N.Y.S.2d 725 (App. Div. 1987) (court denied school district's request to consolidate negligence action with separate action for medical malpractice when request did not come until the negligence action was scheduled).

to bar the child's claim. In addition, the court saw the assault as arising out of the job-created authority over the student, and therefore could impose liability on the school district.

The applicability of a notice of claim requirement was the basis for a decision in a negligence action involving a Maryland pupil.[52] The child was injured when he fell into a hole on his school's playground. After the trial court dismissed the claim, the Maryland Court of Special Appeals remanded the case finding that the 180 day notice of claim did not apply to county boards of education. Such boards were determined to be essentially state agencies and therefore not subject to the notice of claim requirements for county or municipal corporations. The court stated that the notice requirements of the Tort Claims Act also did not apply, adding that the defense of sovereign immunity may be available to the board.

In a suit arising from a chain-reaction collision caused by a school bus, the Supreme Court of Oklahoma reversed a district court decision and found a partial settlement not to be a denial of claim.[53] Such a denial would have triggered a six-month time limit for the commencement of action. The court said that a partial settlement, with a promise to settle the rest of a claim, cannot equitably lull an adversary into a false sense of security and thereby subject the claim to a statute of limitations.

A Tennessee county board of education brought suit against a manufacturer of ceiling materials containing asbestos to recover the cost of removing the material installed in high schools.[54] It had been sixteen years since the installation of the tiles when the action commenced. In a decision which was affirmed by the court of appeals, the district court declared that the state's immunity from the statute of limitations did not apply to the board's warranty action. The basis for the suit was not seen as a necessary part of carrying out a state function.

In a Tennessee case involving warranty claims against manufacturers of products containing asbestos, the district court explained that the statute of limitations does not run against a county seeking to enforce a demand arising out of the exercise of its functions as an arm of the state.[55]

Comparative Negligence. The issue of comparative negligence was involved in a Nebraska case.[56] An action was brought on behalf of a

52. Dean v. Board of Educ., 523 A.2d 1059 (Md. 1987).

53. Whitley v. Oologah School Dist., 741 P.2d 455 (Okla. 1987).

54. Anderson County Bd. of Educ. v. National Gypsum Co., 821 F.2d 1230 (6th Cir. 1987).

55. Johnson County Tenn. v. United States Gypson Co., 664 F. Supp. 1127 (E.D. Tenn. 1985). *See also* Rowan County Bd. of Educ. v. United States Gypsum Co., Inc., 359 S.E.2d 814 (N.C. Ct. App. 1987).

56. Center State Bank v. Dana, Larson, Roubal, 411 N.W.2d 635 (Neb. 1987). *See* Jones v. Sheridan County School Dist., 731 P.2d 29 (Wyo. 1987) (where an accident

thirteen-year-old who was seriously burned in a propane gas explosion. The district court entered judgment on a jury verdict against the architectural firm involved in the planning and construction of the school building where the explosion took place. The Supreme Court of Nebraska accepted the verdict establishing liability and remanded the case for a new trial on the issue of damages. The court determined that the victim neither knew, nor should have known, that the area he was entering into was dangerous. The plaintiff had sought to prove that a thirteen-year-old should have recognized the danger associated with standing near a truck engulfed in a cloud caused by leaking propane gas.

A female junior high school student, who was allegedly group molested in a boy's locker room, sued the board of education, supervising teacher, and individual students.[57] The Maryland trial court's verdict for the student was reversed by the court of appeals and remanded for trial. The court examined the concept of contributory negligence in regards to the fact that the girl had voluntarily entered the locker room. Whether she knew, or should have known, that by entering the locker room she subjected herself to danger was seen as a matter for the jury.

LIABILITY INSURANCE

A Georgia student twisted to avoid being hit a second time during the administration of corporal punishment. This movement caused the principal's blow to cause injury for which damages were sought. The school district's insurer sought to obtain a declaratory judgment that damages in the suit were not covered by the policy. When that was denied by the trial court, appeal was sought with the contention that the insurer was protected from liability by a policy exclusion applicable to bodily injury expected or intended by the insured.[58] The court of appeals upheld the lower court decision by accepting the claim by the principal that the injury was an unintended consequence of the spanking.

A Minnesota cheerleader was injured when a van in which she was travelling to a school sponsored activity was involved in an accident. The court of appeals determined that private liability insurance, which had been purchased by the cheerleader's faculty advisor, did not waive the statutory limits of the school's liability.[59]

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involving a bus driver and a motorist resulted in a jury verdict finding the parties equally at fault).

57. Cambell v. Montgomery County Bd. of Educ., 533 A.2d 9 (Md. 1987).

58. Pennsylvania Millers Mut. Ins. v. Crews, 361 S.E.2d 657 (Ga. Ct. App. 1987).

59. Nelson v. House, 402 N.W.2d 639 (Minn. Ct. App. 1987). In New Milford Bd. of Educ. v. Juliano, 530 A.2d 43 (N.J. Super. Ct. App. Div. 1987) a school district was found entitled to reimbursement for the portion of money paid to an injured student which was

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A negligence action against the board of education was brought on behalf of a New York teacher for injuries sustained when she was attacked by a student.[60] The teacher had requested that a student who had threatened her be removed from her class. Sixteen days before the attack the teacher was advised that a support team had recommended the student's transfer to a special education program. The trial court's decision for the district was affirmed by the court of appeals. The defendants were not found to have assumed an affirmative duty to protect the teacher from the student in question. Furthermore, the defendants had initiated a process by which the student would be removed from the class, but did not notify her that the student would actually be removed.

A Wyoming school bus driver, who was injured when the parking brake on the bus she was driving failed, brought suit claiming that mechanics and co-workers who serviced the bus were negligent.[61] The driver claimed that the defendants knew that the parking brake needed adjustment, failed to repair the brake, and yet allowed her to drive the bus. In affirming the district court judgment for the defendants, the Supreme Court of Wyoming explained that since the driver was covered by worker's compensation, she could only have recovered against her co-employees if they were culpably negligent. This, the court explained, would require that the co-workers had engaged in willful misconduct with a state of mind that approached intent to do harm.

In New York, a teacher was sexually assaulted in the faculty ladies room. The room generally was kept locked and the plaintiff had entered it by using her own key. The assailant was never caught and the manner in which he entered the room was never determined. In her action

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attributable to a physician's medical malpractice. In School Bd. of Broward County v. City of Sunrise, 510 So. 2d 641 (Fla. Dist. Ct. App. 1987) while a city was not required to insure school board, the fact the board was added to the policy provided coverage). For additional cases related to liability insurance, largely decided on technical grounds, *see* Maglio v. NECA-IBEW Welfare Trust Fund, 506 So. 2d 447 (Fla. Dist. Ct. App. 1987), Ferrell v. Southern Farm Bureau Casualty Ins. Co., 724 S.W.2d 465 (Ark. 1987), and Industrial Indem. Co. v. Beeson, 736 P.2d 800 (Ariz. Ct. App. 1986).

60. Meister v. City of New York, 519 N.Y.S.2d 665 (App. Div. 1987). *See also* Zemsky v. City of New York, 821 F.2d 148 (2d Cir. 1987) (court dismissed civil rights action by teacher who alleged that school officials failed to take disciplinary action against assaultive students).

61. Stundon v. Sterling, 736 P.2d 317 (Wyo. 1987). *See* Hoover v. Charlotte-Mecklenburg Bd. of Educ., 361 S.E.2d 93 (N.C. Ct. App. 1987) (school board was not negligent in maintenance, repair, or operation of school bus which was involved in a serious accident when its rear wheels fell off, and brakes failed to work). Benefits also were denied in Youngblood v. Sanders, 513 So. 2d 521 (La. Ct. App. 1987) (where physical circumstances together with bus aide's incredibility supported conclusion that her injuries were not caused by accident between bus and automobile).

against the city, the plaintiff sought to establish that her injuries were proximately caused by the defendants' negligent failure to maintain their premises in a reasonably safe manner.[62] It was alleged that the defendants had maintained a system of distributing keys that was so inadequate that keys were likely to fall into unauthorized hands, making it foreseeable that such a violent intrusion would occur. The trial court found in favor of the teacher. The court of appeals reversed that decision finding that the alleged negligence did not stem from failure to fulfill a proprietary duty, but rather from the defendants' exercise of their governmental functions. The court saw it as well established that the provision of security against attacks from third parties is a governmental function from which no liability arises, absent a showing of a special duty of protection. No such duty was recognized in this case.

A parent who had participated at a school picnic in Louisiana was convicted of aggravated battery following an incident involving the school's principal. Following an exchange with the female participant regarding the consumption of alcohol during the event, the contents of a wine glass were thrown in the principal's face. The defendant then struck the principal in the face with the glass, shattering it and severely cutting her face. The court of appeals affirmed the conviction holding admissible (1) the testimony that the defendant was drunk as state of mind evidence, (2) the wine glass allegedly used in the attack, and (3) a photograph showing the extent of the principal's injuries. Additionally, a sentence of six years at hard labor was not seen as inherently excessive.[63]

During the school day, a junior high school teacher in Oregon left the school building to deliver two boxes of school-related papers to his home. He was accompanied by a former student who had gone to the school to discuss some personal problems with the teacher. While helping the teacher carry the boxes to the porch of his home, the student accidentally hit his eye with her elbow causing damage to the eye. The teacher sought review of the workers' compensation board ruling which denied him benefits.[64] The court of appeals reversed that decision finding the injury work-related. The teacher's activity was seen as beneficial to the school, and the requirement that teachers sign out when they leave the school during school hours was held to acquiesce in his activity.

Whether a teacher's attendance at a school math club outing was an implied requirement of employment was the central issue in a workers'

62. Marlyn S. v. City of New York, 521 N.Y.S.2d 485 (App. Div. 1987).
63. State v. Francosi, 511 So. 2d 1181 (La. Ct. App. 1987).
64. Preston v. Saif, 745 P.2d 783 (Or. Ct. App. 1987).

compensation case.[65] The teacher's wife sought benefits in connection with an injury which resulted in the teacher's death. The California Supreme Court reviewed the earlier determinations that benefits be denied. Although evidence was presented that the teacher's attendance was not mandatory, the court felt that as a temporary teacher he was vulnerable to pressure to participate in extracurricular activities. Although the school was only minimally involved in the outing, teachers were encouraged to involve themselves in such events. Explaining that the labor code provides that workers' compensation laws "shall be liberally construed by the courts with the purpose of extending their benefits,"[66] the court held that the employee should be compensated.

A shop teacher, who had been exposed to excessive noise for fourteen years, sought disability benefits for his hearing loss.[67] A Colorado court of appeals upheld the Industrial Commission's conclusion that the loss was a compensable occupational disease. Medical evidence supported the finding that the hearing loss was noise induced, and the school employment was found to have been the last injurious exposure.

A security worker in an Alaskan school district was denied workers' compensation benefits for disability due to emotional distress and back injury. At trial, the decision by the workers' compensation board was affirmed. After the claimant committed suicide, his widow appealed that decision.[68] The Supreme Court of Alaska reversed the part of the decision related to the stress claim. The fact that the worker had other sources of stress was not found to detract from the assertion that stress significantly contributed to his illness. The workers' compensation board had used the "unusual stress in the profession test."[69] The court rejected the applicability of this test holding that an employer cannot dismiss one employee's response to job stress because other employees do not become disabled in response to identical stress.

In Colorado, a tenured teacher claimed that her strongly expressed support for the expansion of the district's foreign language program evoked retaliatory actions against her by the principal and superintendent. In particular, the teacher claimed to have been unfairly reprimanded, harassed, and demoted from her position of full-time teacher

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65. Smith v. Workers' Compensation Bd., 236 Cal. Rptr. 248 (Ct. App. 1987).

66. *Id.* at 258.

67. Jefferson County Schools v. Headrick, 734 P.2d 659 (Colo. Ct. App. 1986).

68. Wade v. Anchorage School Dist., 741 P.2d 634 (Alaska 1987). *See* Dougherty County Bd. of Educ. v. Lundy, 359 S.E.2d 403 (Ga. Ct. App. 1987) (worker not entitled to compensation due to lack of physical injury to support her claim of psychological injury). *But see* Hicks v. Putnam County School Bd., 510 So. 2d 1171 (Fla. Dist. Ct. App. 1987) (where no effective date of maximum medical improvement was established, claimant could not have her claim of psychiatric care and treatment barred).

69. *See* Delaney v. Alaska Airlines, 693 P.2d 859, 864 (Alaska 1985).

to that of permanent substitute teacher. When the superintendent discovered the teacher was tape-recording a discussion with him, he allegedly assaulted her and threw her to the ground in an effort to confiscate the recorder. The defendants sought a summary judgment on the teacher's claim of infringement of her first amendment rights, and claims of assault and outrageous conduct. The district court denied the motion finding the emotional injuries allegedly sustained by the teacher did not arise out of her employment, and were not the type to be covered by workers' compensation. The questions of fact precluded a summary judgment on the other charges.[70]

A ground maintenance worker brought a workers' compensation action against his Texas school district for injuries incurred while driving a tractor mower.[71] The school district appealed the trial court's decision that the worker was totally and permanently injured. The worker had stayed at the same job doing essentially the same work for two years after his injury. The court of appeals recognized that the worker was only qualified to do menial work, and understood how he could have tried to continue to work without complaining of pain. In finding for the worker, the court explained that "a person is totally disabled when he is disqualified from performing the usual acts of a workman in such a way as to enable him to procure and retain employment."[72]

A Pennsylvania worker who was declared totally disabled by the Workman's Compensation Appeals Board faced an appeal of his award.[73] The employer contended that a causal relationship between the injury and the workplace had not been established. In affirming the award, the court determined that the lung damage incurred by the worker was a direct result to chlorine fumes inhaled at the workplace. The worker was not required to prove that the incidence of his injury was substantially greater in his industry or occupation than in the general population.

In an attempt to raise her workers' compensation benefits, a former school custodian disputed the method by which those benefits were calculated. The extent of her permanent disability was measured by the difference between her average pre-injury wage and the post-injury wage she received when the injury stabilized. In the appeal of her award, the plaintiff claimed that the workers' compensation board based her earning capacity on wages from three years before, which did

70. Kirk v. Smith, 674 F. Supp. 803 (D. Colo. 1987).

71. Northeast Indep. School Dist. v. Hayes, 727 S.W.2d 25 (Tex. Ct. App. 1987).

72. *Id.* at 27.

73. Pittsburg Bd. of Educ. v. WCAB, 529 A.2d 1166 (Pa. Commw. Ct. 1987). For a case in which an employer was found to have arbitrarily discontinued benefits see Lutz v. Jefferson Parish School Bd., 503 So. 2d 106 (La. Ct. App. 1987).

not reflect the full amount of her earnings loss. The Supreme Court of Alaska accepted that analysis in upholding the lower court findings, but agreed that the worker did not demonstrate exceptional circumstances meriting a lump sum award.[74]

A cafeteria worker in Texas appealed a district court decision that she was not entitled to workers' compensation benefits for a job-related injury.[75] The worker had filed an interrogatory asking for the names of all persons the school district planned to call as witnesses. At the trial, the district produced an "expert witness" who was allowed to testify over the objection of the plaintiff. In reversing the lower court decision and remanding the case for trial, the Supreme Court of Texas disagreed with the holding that "witnesses" and "expert witnesses" are completely separate concepts. The surprise witness should not have been allowed to testify without a showing of good cause. This error amounted to a denial of the worker's rights leading to an improper judgment.

A Pennsylvania teacher sought workers' compensation benefits following an assault during the course of her employment.[76] Benefits were granted and both the claimant and school district petitioned for review. The court made determinations in three areas. First, there was a question of the appropriateness of the award of forty weeks compensation for the teacher's disfigurement. The court upheld the award on the basis that the amount of an award for disfigurement is a question of fact which cannot be disturbed unless there has been an inadequate description of the disfigurement. Second, since there was evidence that the employer failed to effectuate the claim for compensation, the court reversed the compensation board on the matter of penalties. The school district's unreasonable delay was found to warrant a 20% penalty per

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74. Fairbanks North Star Borough School Dist. v. Crider, 736 P.2d 770 (Alaska 1987). *See also* Duran v. Albuquerque Pub. Schools, 731 P.2d 1341 (N.M. Ct. App. 1986) (disabled educational aide's request to have her workers' compensation benefits calculated on the basis of a 52-week work year rather than the 40-week work year which she actually worked was denied); North Clackamas School Dist. v. White, 737 P.2d 649 (Or. Ct. App. 1987) (employer successfully sought review of workers' compensation board decision which upheld employee's claim of aggravation of original injury); and Cormier v. Lafayette Parish School Bd., 508 So. 2d 207 (La. Ct. App. 1987) (employee who was granted sabbatical leave while receiving workers' compensation benefits was not entitled to benefits during the leave).

75. Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691 (Tex. 1987). *See* Gutierrez v. Dallas Indep. School Dist., 722 S.W.2d 530 (Tex. 1986) (where trial court was not found in error for allowing testimony when an employee seeking disability benefits had not specifically requested the school district list its expert witnesses).

76. School Dist. of Philadelphia v. WCAB, 531 A.2d 547 (Pa. Commw. Ct. 1987). *See* White v. Naquin, 500 So. 2d 436 (La. Ct. App. 1986) (where a school district, which had paid workers' compensation benefits to a school bus driver who was injured when tripped by a student, was not required to indemnify the third party held liable for damages to the employee).

annum on the compensation. Third, the school district claimed entitlement to a 100% credit for sickness and accident benefits paid the teacher during her disability. The court explained that the crucial factor is the identity of the party who is paying the insurance premiums. Since the employer and the teacher each paid half, the 50% credit awarded to the district was upheld.

ASSAULT AND BATTERY

The constitutionality of a Florida assault and battery statute was challenged in a case where a parent appealed his conviction of battery upon a school board employee.[77] The appellant claimed that the statutory division of people, for sentencing purposes, into two classes (those subject to the discipline of the school and those who are not) violated the equal protection clause and was void for vagueness. Significant to the issue was the fact that the penalty for battery under the statute was significantly harsher than battery under a statute which did not involve school employees. In upholding the constitutionality of the statute, the court recognized the intent to maintain and protect the integrity of the school setting and the standing of teachers as role models. By helping to insulate the state's school children from violence, the court found that legitimate state interests were fulfilled and thus an elite class had not been established.

In Illinois, a teacher and principal were charged with battery in connection with the infliction of corporal punishment on a sixth-grade student.[78] The trial court entered judgment on a jury verdict in favor of the teacher and convicting the principal of battery on the basis of accountability. The punishment, which involved a total of twenty-four blows with an oak paddle, was administered by the teacher and seen by the court as excessive. The appeals court affirmed that decision on the basis that (1) the principal was responsible for discipline at the school, (2) the punishment took place in the principal's office with the principal acting as witness, and (3) at no time did the principal oppose the conduct of the teacher.

DEFAMATION

Following the publication of a newspaper article, a California teacher brought an action against the paper alleging an invasion of his pri-

77. Walker v. State, 501 So. 2d 156 (Fla. Dist. Ct. App. 1987).

78. People v. Wehmeyer, 509 N.E.2d 605 (Ill. App. Ct. 1987). *See* Friedland v. Ambach, 522 N.Y.S.2d 696 (App. Div. 1987) (dismissal of teacher supported by evidence that teacher improperly administered corporal punishment to second grade students).

vacy.[79] The article told of a suit the teacher had brought against his principal in which he claimed an evaluation report libeled him, and how ten years before the teacher had been acquitted of murdering his wife. The teacher's complaint that the newspaper invaded his privacy and intentionally inflicted emotional distress was denied. The court of appeals explained that a cause of action for invasion of privacy requires a public disclosure of private facts which are offensive and objectionable to a reasonable person of ordinary sensibilities.[80] However, there is not necessarily a right to privacy of a matter of general interest which has already been publicly released. In this case the facts of the wife's death had been fully reported, as had the teacher's numerous public lawsuits which related to the incident. The court found that newsworthiness had been established as a matter of law.

A substitute teacher brought an action for libel, slander, and harassment in connection with a letter sent by the principal of a Pennsylvania high school.[81] The letter said the services of the teacher would no longer be required because of problems the substitute had following lesson plans, keeping attendance, and preparing daily activity reports. The trial court's decision against the teacher was affirmed by the appeals court. The statements in the letter were not seen as criticisms of the teacher's skills as a teacher, but rather commented on his adherence to administrative policies. The only other persons who received the notice were the directors of personnel and secondary education who, the court felt, could be expected to properly interpret the remarks. No basis for libel or slander were found. Similarly, the plaintiff failed to allege facts which would create a tort for harassment as the letter would have to be without legitimate purpose, or written merely for the purpose to annoy.

Following misconduct on a school-sponsored field trip in Pennsylvania, the principal sent to a student's parents and to the school board notification of the student's suspension. That action was the basis for a claim against the principal for defamation and the intentional infliction of emotional distress. The appeals court affirmed the lower court's dismissal of the action.[82] The principal's conduct was not determined to be an exception to immunity as he had not acted with actual malice or willful misconduct. There was no publication of defamatory material to one not required to receive the notice by statute. Finally, there was no willful misconduct by the principal in sending a notice of suspension that he was required by law to send.

In New York, a mother sought damages from her daughter's teacher

79. Waser v. San Diego Union, 236 Cal. Rptr. 772 (Ct. App. 1987).
80. *Id.* at 775.
81. Sobel v. Wingard, 531 A.2d 520 (Pa. Super. Ct. 1987).
82. Keeler v. Everett Area School Dist., 533 A.2d 836 (Pa. Commw. Ct. 1987).

and school district for slanderous statements made by the teacher.[83] During a discussion in a seventh grade reading class, the teacher commented on having taught the student's mother, who was forced to leave school because of pregnancy. The trial court refused the school district's motion for a summary judgment and the district appealed. That order was affirmed when the appellant court found the issue triable. The court reminded that an employer may be held vicariously liable for a tort committed by an employee in the course of his duties, and that actionable wrongs for which an employer may be held liable include slander.

Communications from the superintendent of schools to the school board were the basis for a libel and slander action by an elementary school principal in Michigan.[84] The defendant superintendent had sought to have the plaintiff separated from his employment with the school district. The trial court denied the defendant's motion for summary judgment on the grounds of absolute or qualified privilege. The court explained that absolute privilege is confined to cases involving (1) the proceedings of legislative bodies, (2) judicial proceedings, and (3) communications by military and naval officers. In upholding the lower court, the court of appeals assumed the existence of qualified privilege. To prevail in a suit where such privilege exists, the plaintiff must show actual malice. The court concluded that the plaintiff should have the opportunity to show actual malice at a trial.

Tortious Interference with a Contract

In Connecticut, the failure of a school board to rehire a nontenured teacher resulted in an action seeking damages premised on liability for breach of contract and negligent misrepresentation.[85] The principal had told the teacher that she should plan on returning the next year, and he posted a notice stating that all present faculty members would be offered contracts. The Connecticut Supreme Court upheld the appellate court decision that the principal's actions did not impose contractual liability. However, the appellate decision on negligent misrepresentation was reversed. The holding was that the defendant school board and principal knew, or should have known, that hiring plans would be contingent upon declining student levels for the following year. The employer had failed to exercise reasonable care in making representations upon which the employee had relied.

The issue raised in a case emanating from Rhode Island was whether

83. Murry v. Watervliet City School Dist., 515 N.Y.S.2d 150 (App. Div. 1987).
84. Grostick v. Ellsworth, 404 N.W.2d 685 (Mich. Ct. App. 1987).
85. D'Ulisse-Cupo v. Board of Directors, 520 A.2d 217 (Conn. 1987).

a municipality was vicariously liable for the actions of its school superintendent.[86] The plaintiff, a terminal manager of the company which provided bus transportation for the municipality, sought damages for a tortious interference with his contractual rights. Two days before he was fired, the plaintiff's employer received a letter from the school superintendent seeking the plaintiff's discharge. The lower court determination that the municipality could not be held liable for the actions of the superintendent was reversed by the state's supreme court. School committees carrying out functions assigned to them were determined to be exercising a portion of the state's sovereignty. And, while not state agencies, the court considered them municipal bodies and their employees municipal employees. The court disagreed with the contention that the town could avoid liability for the tortious acts of its municipal employees.

PRODUCTS LIABILITY

A Rhode Island student was killed when he was struck on the head by a descending garage door while attending an automobile repair class. The resulting action centered on two elements: (1) whether a municipal department, like the school committee, could properly be named in the action, and (2) a products liability claim against the manufacturer of the garage door opener.[87] The trial court's ruling was affirmed on both aspects of the case. In the first instance, the court explained that in a suit against a department the municipality is the proper party to name. On the products liability claim, no defect in the design or manufacture of the product was found which would make the product unsafe for its intended use. The court explained that "while reasonable inferences can be drawn from the evidence in situations where direct proof is not available, these inferences may not rely on mere conjectures or speculations."[88]

A custodian of a New York City intermediate school was found dead on the floor of the school boiler room with a wrench in his hand. His widow brought suit against the designer of the boiler room, the general contractors, and the mechanical contractor, contending that her husband's death was the result of negligent design and construction of the boiler room. However, the court failed to find a proximate cause

86. Mellor v. Clancy, 520 A.2d 1278 (R.I. 1987).

87. Peters v. Jim Walter Door Sales of Tampa, 525 A.2d 46 (R.I. 1987).

88. *Id.* at 49. *See* Catasauqua Area School Dist. v. Raymark Industries Inc., 662 F. Supp. 64 (E.D. Pa. 1987) (court failed to find any of various commercial defendants liable for damages incurred by asbestos abatement).

between the design and construction and the death of the custodian, and therefore held against the widow.[89]

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

An Ohio eighth-grade student, who was disciplined for taking an extra towel during gym class, brought an action alleging the intentional infliction of emotional distress.[90] After laughing at the teacher and refusing to return the towel, the student was ordered to do twenty-five push-ups. Still naked, the student asked if he could go to his locker and put on his shorts before complying. With his request denied the student began doing the pushups, during which time he claimed the teacher taunted him. At trial, another student testified that the taunt came from a student. The court of appeals affirmed the trial court's decision in favor of the school board and teacher. The action by the teacher was not seen as extreme and outrageous. Furthermore, although the student may have been embarrassed, such feelings were not considered to reach the level of severe emotional distress.

In Michigan, a former teacher brought an action against her school board after she was given an unsatisfactory job performance evaluation.[91] She alleged negligent evaluation, conspiracy, and intentional infliction of emotional distress. The circuit court denied the defendant's motion for a summary judgment and the district appealed. In finding against the teacher, the court could not find any conduct which would constitute a tort. The teacher alleged the evaluations were undertaken with an intent of getting her to leave. The court explained that since the district was privileged to evaluate the plaintiff's classroom performance, it could not be held liable for intentional infliction of emotional distress. This was true, even if they knew the evaluations could cause emotional distress. At best, the district was negligent in following procedures set forth in the collective bargaining agreement.

The state of Arkansas has a teacher-testing program which is required by state law. A teacher, whose test scores were mailed to another teacher by the computer company hired to score the tests, brought an action against that company.[92] She claimed negligence, violation of statute, invasion of privacy, and outrageous conduct resulting in extreme emotional distress. The teacher appealed the district court summary

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89. Ferguson v. Abrams, 514 N.Y.S.2d 376 (App. Div. 1987). *See* Massie v. Persson, 729 S.W.2d 448 (Ky. Ct. App. 1987) (judgment for construction defendants upheld as the failure of a coach to properly install whirlpool found to be the substantial factor in a student's electrocution).

90. Jackson v. Board of Educ., 504 N.E.2d 1144 (Ohio Ct. App. 1985).

91. Sankar v. Detroit Bd. of Educ., 409 N.W.2d 213 (Mich. Ct. App. 1987).

92. Wood v. National Computer Sys. Inc., 814 F.2d 544 (8th Cir. 1987).

judgment for the computer company. The court of appeals agreed that the company had been negligent, but did not find the negligence to meet the standard of being atrocious or exceeding all possible bounds of decency. Furthermore, absent physical injury, Arkansas law does not recognize cause of action for negligent infliction of emotional distress. As to the invasion of privacy, the disclosure of the plaintiff's score to one other person was not found to be highly objectionable.

A New York principal was suspended from his tenured position and brought an action against the school district.[93] His claim of a deprivation of his constitutional rights to liberty and property was denied by the trial court. However, in a decision which was upheld by the court of appeals, the principal was found to have stated a valid cause of action for defamation and the intentional infliction of emotional distress. The plaintiff alleged that the school board had spread false rumors that he had been involved in an affair with an associate, that he had used student funds for his own benefit, and that he had used associates to perform work on his home during school hours. The court explained that board members are only immune for statements made in the discharge of their quasi-judicial duties. The statements were not found to be protected by privilege, and it was a matter for the jury to determine if they were defamatory.

The student editor of a school yearbook in Massachusetts brought an action to recover for damages for emotional distress, and for related costs of psychological counseling allegedly necessitated by the actions of school staff members.[94] Shortly after the student was appointed editor of the school yearbook, a former student was discovered to be larcenously selling advertising space to local merchants. The plaintiff was suspected as an accomplice in the fraud and removed as editor. When an investigation concluded that he had not been involved, the student was reinstated as editor. Nevertheless, certain members of the school's staff and administration disseminated, or permitted to be disseminated, allegations of the student's complicity. When the yearbook was published, it was found to contain hostile comments by yearbook staff members (presumably students) carrying the innuendo that the plaintiff had been a party to the fraud. In affirming the trial court's decision to dismiss the case, the court of appeals pointed to the dilemma faced by the plaintiff. If he established that members of the school staff committed negligent infliction of emotional distress he would lose because there was no claim of physical harm. If he established that the

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93. Sullivan v. Board of Educ. of the Eastchester Union Free School Dist., 517 N.Y.S.2d 197 (App. Div. 1987).

94. Tilton v. Town of Franklin, 506 N.E.2d 897 (Mass. App. Ct. 1987).

school staff committed an intentional infliction of emotional distress, he would lose because the defense of sovereign immunity had not been waived with respect to that tort by the Massachusetts Tort Claims Act. Faced with this the action was framed as one for "reckless infliction of emotional distress," which the plaintiff claimed was a tort distinct from intentional infliction of emotional distress and thus not barred under the Tort Claims Act. In rejecting that claim, the court found the essence of wanton or reckless conduct to be intentional conduct with a commission or omission where there was a duty to act.

CONSTITUTIONAL TORTS

Several individual peace activists and a coalition of peace organizations brought an action following a ban on their participation on "career days" in the Atlanta public schools.[95] The complaint alleged that there had been a violation of the activists' first and fourteenth amendment rights when they were denied the use of established channels to present information to students. The court identified three categories of government property: (1) traditional public forums which have long been devoted to assembly and debate; (2) designated, created, or limited public forums which are opened to the public for an expressed activity; and (3) nonpublic forums. In traditional and designated public forums, speakers can be excluded on the basis of the content of their message only when the exclusion is necessary to serve a compelling state interest. The court explained that, even in a nonpublic forum, it is a denial of first amendment rights if a speaker is denied access solely to suppress the viewpoint he espouses.

The court found the activists' peace oriented educational and career opportunity information consistent with that generally provided to guidance offices, bulletin boards, and career days. At the same time the court rejected the argument that the recruiting needs of the military justified preferential access to military recruiters and personnel.

Student Initiated Cases

In South Dakota, a section 1983 action was brought against a second grade teacher, her principal, and the superintendent of schools.[96] The action alleged substantive due process violations as a result of physical and emotional abuse which stemmed from corporal punishment. The

95. Searcey v. Crim, 815 F.2d 1389 (11th Cir. 1987). *Cf.* Burk v. Unified School Dist. No. 329, 116 F.R.D. 16 (D. Kan. 1987) (where plaintiff was entitled to recover costs, even though no monetary loss was suffered, when jury had found district denied his right to due process).

96. Rubek v. Barnhart, 814 F.2d 1283 (8th Cir. 1987).

teacher had slapped and kicked several of her students, called them derogatory names, and hit them with a wooden paddle. Parents had complained on several occasions to either the principal or the superintendent. The district court granted a directed verdict in favor of the principal and superintendent on the section 1983 action, but the action against the teacher went to a jury trial. There, the teacher was found guilty of assault and battery and intentional infliction of emotional distress. However, the jury found in her favor on the section 1983 issue. On appeal of the action against the principal and superintendent, the circuit court explained that the jury's finding that the teacher had not violated the children's constitutional rights prevented consideration of such an action against those administrators. While deploring the actions complained of, the court reminded that not every violation of state tort or criminal assault laws committed by a state officials results in a constitutional violation.

A civil rights action was brought on behalf of a hyperactive and emotionally disturbed student against an Indiana school system, school board, principal, and teacher alleging that discipline techniques employed violated his equal protection and due process rights.[97] Indiana law authorizes the use of moderate corporal punishment subject to meeting four tests: (1) the teacher must have the general authority to inflict corporate punishment on the pupil; (2) the rule violated must be within the scope of the educational function; (3) the violator of the rule must be the one punished; and (4) the punishment inflicted must be in proportion to the gravity of the offense. The district court analyzed the variety of techniques the school employed in an effort to discipline the student, including: paddling, which was not found to be excessive; isolated seating, which was seen as relatively innocuous and warranted; and taping the student's mouth, which was actually done by the student himself and, while not exemplary, did not exceed the bounds of common law. Explaining that handicapped children are not entitled to any unique exemptions or protections from a school's disciplinary procedures, the court agreed that the plaintiff received the same punishment any other child would have received. Since the plaintiff was unable to establish any interests which were fundamental to an equal protection analysis, the defendants only needed to show that there was a rational basis for their conduct. The examination of the evidence by the court showed such a basis.

Whether corporal punishment of a school child can violate substantive constitutional rights under the due process clause, was the issue in a case from New Mexico.[98] The district court decision that school officials

97. Cole v. Greenfield-Cent. Community Schools, 657 F. Supp. 56 (S.D. Ind. 1986).
98. Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

were protected by qualified immunity was reversed by the court of appeals. The high threshold for recovery on a constitutional tort for excessive corporal punishment was recognized by the court. However, the allegations that a nine-year-old was held up by her ankles and hit several times with a split board on the front of her legs until they bled was found to be sufficient. A second beating of the same child, which resulted in bruises an examining nurse said she would have reported as child abuse if they were received at home, were also found sufficient. Recognizing that the claims might not hold up at trial, the court still determined they overcame the defendant's motion for a summary judgment.

Female students brought a section 1983 action against a Missouri board of education, teacher, and another nonsupervisory teacher alleging a deprivation of their civil rights as a result of sexual abuse by the teacher.[99] The district court explained that a local governmental entity cannot be found liable under section 1983 for an injury inflicted solely by its employees. There must be a causal connection between the misconduct complained of and the governmental entity being sued. Mere negligent inaction, rather than deliberate indifference to a pattern of unconstitutional conduct, will not suffice. In denying the motion to dismiss, the court found the board had failed to receive, investigate, and act upon complaints concerning the teacher's misconduct. In addition, despite its general knowledge of incidents involving sexual abuse, the board failed to develop administrative policies or provide training for the detection of such incidents. These acts and omissions were seen to be undertaken with a callous and deliberate indifference to the plaintiff's rights. There was, however, no recovery under section 1983 against the other teacher for failure to report her knowledge of the sexual abuse. The court explained that generally speaking there is no duty which flows from one individual to another to protect the other from harm. The plaintiffs failed to assert a duty created by the Missouri child abuse reporting statute as it created a duty owed to the general public, not to specific individuals.

A female member of a Pennsylvania high school band brought a section 1983 action against the school district and officials for injuries arising from sexual assaults by the band's director.[100] Comparing a student's right to be free from the physical abuse of excessive corporal punishment, the district court held that the band member had a liberty interest entitled to constitutional protection in being free from constant threats, sexual abuse, and sexual harassment. Issues of fact regarding

99. Thelma D. v. Board of Educ., 669 F. Supp. 947 (E.D. Mo. 1987).
100. Stoneking v. Bradford Area School Dist., 667 F. Supp. 1088 (W.D. Pa. 1987).

school district practices, which may have made the injury possible, precluded the summary judgment sought by the district, as well as an immunity defense.

A Wisconsin student and his parents filed suit against a school district alleging that the district negligently allowed a homosexual relationship to develop between the student and a teacher.[101] The complaint also stated a section 1983 action claiming a violation of the student's constitutional rights. The circuit court decision for the defendants was appealed. In upholding that decision, the court of appeals examined the premise that the district had in essence a "policy" against teachers sexually assaulting students and that its employees had been negligent in carrying out that policy. The court recognized that no school board member would disagree with the proposition that such acts are improper. However, this did not establish a specific policy which was negligently implemented.

With regards to the section 1983 claim, to rise to the level of gross negligence or deliberate indifference, the evidence must show that the district (1) knew, or should have known, that the teacher was engaging in unconstitutional behavior and (2) failed to take remedial action. In this case the student had taken pains to hide the relationship, and there was simply no evidence that the district had any knowledge of it. Additionally, there was no evidence the district knew of the likelihood of such activities involving the teacher. Finally, the district avoided municipal liability as there was no pattern of constitutionally offensive acts followed by a failure to invoke remedial measures.

A student who was beaten unconscious while riding home on his school bus brought a section 1983 action against his Texas school district and bus driver.[102] The contention was that the student was deprived of his liberty interest when the driver failed to stop several students from beating him, and by failure of the school district to properly train its drivers. The district court granted a summary judgment for the school district. The court of appeals agreed that the plaintiff's claim against the district was barred, explaining that any negligence by the school district did not focus on an identifiable group or individual. There was no support for a finding of gross negligence or deliberate indifference to the constitutional rights of students. The court reversed the part of the decision dealing with the bus driver, and remanded the case. The sequence of events, including when he took action to stop the fight, were seen as questions of fact for the jury.

The right of a second grade student to be free from bodily restraints

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101. Kimpton v. School Dist. of New Lisbon, 405 N.W.2d 740 (Wis. Ct. App. 1987).
102. Lopez v. Houston Indep. School Dist., 817 F.2d 351 (5th Cir. 1987).

was examined in a case also originating in Texas.[103] Using a jump rope, the student's teacher secured the eight-year-old by her waist and legs to a chair. Except for her lunch hour, the student was tied to the chair for an entire day. On the second day, she was again tied to the chair for protracted periods. While tied, the student was denied access to the bathroom. This treatment, which was received by no other student, was not a punishment, but a part of an instructional technique imposed by school policy. The suit alleged that the girl's principal and teacher violated her rights under the fourth, fifth, eighth, and fourteenth amendments. The defendants' claim that no cause was stated upon which relief could be granted was denied by the circuit court, as was their claim to qualified immunity.

In affirming that decision, the court of appeals agreed that the defendants were immune from liability unless their actions violated one or more of the student's constitutional or statutory rights. However, the court recognized that a competent teacher would know, or should have known, that to tie a second-grade student to a chair for an entire day as an educational exercise, was constitutionally impermissible. In particular, "the right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process."[104]

A diabetic student and her mother brought a section 1983 action against the school district, teacher, school nurse, and principal for allegedly depriving the student of needed medical attention and medication.[105] The Pennsylvania district court dismissed all three counts of the suit. The failure of the school district to train and supervise its employees properly, based on a single incident, did not state a section 1983 cause of action. The student could not assert an equal protection claim since, other than being handicapped, she was not a member of a protected class or subjected to unjust and illegal discrimination. Finally, the court held that a section 1983 claim could not be used in an action where the Education of All Handicapped Act was applicable.

Employee Initiated Cases

A nontenured teacher in Colorado brought a section 1983 action alleging that the school district's decision not to renew her teaching contract violated her rights under the first and fourteenth amendments to the Constitution.[106] The plaintiff's claim that her dismissal was for

103. Jefferson v. Yseleta Indep. School Dist., 817 F.2d 351 (5th Cir. 1987).
104. *Id.* at 305.
105. DeFalco v. Deer Lake School Dist., 663 F. Supp. 1108 (W.D. Pa. 1987).
106. Salida School Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo. 1987). *See also* Montgomery v. Trinity Indep. School Dist., 809 F.2d 1058 (5th Cir. 1987).

"outspokenness" was upheld in an unemployment compensation hearing, and by the district court. The school district appealed, the decision was upheld by the court of appeals, and then reversed by the Colorado Supreme Court. The state high court explained that in a section 1983 action where there is an alleged violation of first amendment rights, "the employee must establish that constitutionally protected conduct was a substantial, motivating factor in the employer's decision to dismiss the employee."[107] If the employee makes that initial showing, to avoid liability the employer must show the same decision would have been made in the absence of the protected conduct. The court explained that in the context of dismissal controversies, speech is not protected unless it relates to a matter of public concern. As none of the issues related to the plaintiff's claim of unconstitutional discharge was addressed in the unemployment compensation proceeding or subsequent trials, the decision of the court of appeals was reversed and the case remanded.

Teachers of an Arkansas school district brought an action seeking damages for alleged retaliatory actions in response to a letter they wrote to the state department of education.[108] The letter complained of a delay in implementing programs for handicapped students. The principal issue was whether the teachers were exercising constitutionally protected rights of free speech under the first amendment. The district court decision for the teachers was affirmed by the court of appeals. The teachers were found to have been exercising their rights as citizens regarding a matter of public concern.

In another section 1983 case related to a first amendment claim, a tenured Illinois teacher claimed he was fired in retaliation for exercising his right to free speech by reporting criminal misconduct by his superiors.[109] The hearing officer found that the teacher was guilty of conduct that constituted statutory grounds for dismissal which were unrelated to his first amendment claim. After a circuit court affirmed his dismissal, the teacher brought his action before the Seventh Circuit Court of Appeals. That court recognized that the teacher's actions of reporting the misconduct may have angered his superiors. But, in affirming the earlier decision against the teacher, the court determined that although the hearing officer and circuit court may not have properly examined the retaliation issue, such a substantive error did not constitute grounds for reversal.

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107. 732 P.2d at 1165.

108. Southside Pub. Schools v. Hill, 827 F.2d 270 (8th Cir. 1987). *See* Lockhart v. Board of Educ., 735 P.2d 913 (Colo. Ct. App. 1986) (teacher's refusal to perform hall duty, which he asserted stemmed from his belief that such a performance would nullify his teaching precepts, was not considered a matter of public concern so as to be entitled to constitutional protection).

109. Button v. Hardin, 814 F.2d 382 (7th Cir. 1987).

A New York teacher sought monetary and injunctive relief under section 1983 after being removed as the faculty advisor to a school newspaper. The teacher was removed following the publication of a controversial article opposing the proposed federal holiday in honor of Martin Luther King. The plaintiff had worked with the student who wrote the article, even though he disagreed with its content, to make sure it complied with the paper's journalistic standards. The district court held that the teacher had third party standing to seek relief as the students' first amendment rights were seen as inextricably bound with the teacher's role as advisor. In denying the injunction, the court determined that it was an issue of fact as to whether the teacher had a property interest in the position for which he would be entitled to due process protection.[110]

Following a classroom evaluation conducted by a consultant hired by a New York school district, a teacher was advised that he must visit a dentist to improve the condition and appearance of his teeth, and a physician to develop a plan for an appropriate weight loss program. The teacher brought an action against the superintendent of schools and others alleging a section 1983 violation of his rights. When the trial court failed to dismiss the cause of action, the superintendent appealed.[111] The court determined that the teacher failed to establish that the superintendent's conduct infringed upon a protected liberty interest. The superintendent took no steps to compel the teacher's compliance with the directive, and the directive had been effectively negated by the Commissioner of Education.

A former New York school teacher brought a section 1983 action based on the presence of allegedly false and defamatory charges of sexual misconduct with students in his personnel file.[112] The district court ruled that in order for the teacher to establish his liberty interest, he had to prove that the sexual allegations about him were false and that there was an actual disclosure of them to individuals other than those involved in the investigation. Finding the teacher unable to prove actual disclosure of the allegations, the district court granted a summary judgment to the school board. That decision was reversed by the court of appeals which held that the presence of the charges in the teacher's personnel file satisfied the public disclosure requirement because of the likelihood that these charges may be disclosed in the future. In remanding the case, the court said the teacher must be given the opportunity to substantiate his contention that the personnel file is likely to be made

110. Romano v. Harrington, 664 F. Supp. 675 (E.D.N.Y. 1987).
111. Mermer v. Constantine, 520 N.Y.S.2d 264 (App. Div. 1987).
112. Brandt v. Board of Coop. Educ. Servs., 820 F.2d 41 (2d Cir. 1987).

available to prospective employers. With regards to establishing the falsity of the charges, it is only necessary that a plaintiff raise the issue of falsity in order to establish a right to a name-clearing hearing.[113]

113. Codd v. Velger, 429 U.S. 624, 627 (1987).

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SPORTS

Stephen B. Thomas

Introduction / 179
Eligibility / 179
- Discipline / 179
- Grades / 179
- Medical Examination / 180
- Outside Participation / 180
- Participation as a Professional / 181
- Transfer / 181

Equality of Programs / 182
- General / 183
- Girl to Play on Boys' Team / 184
- Boy to Play on Girls' Team / 184

Enforcement of Rules / 184
- Membership / 184
- Probation/Sanction / 185

Tort / 185
- Intentional / 186
  - Assault and Battery / 186
  - Defamation / 186
- Negligence / 186
  - Participants / 186
  - En Route to Game / 189
  - Spectators / 189

Employment / 190
- Adverse Employment Decisions / 190
  - General / 190
  - Immorality / 191
  - Insubordination / 191
- Contract Disputes / 192
- Discrimination / 193
- Unemployment Compensation / 194
- Workers' Compensation / 194

Miscellaneous / 195
- Amusement Tax / 195
- Public Records / 195
- Student Athletic Fees / 196

INTRODUCTION

This Chapter includes all cases involving student-athletes, coaches, athletic directors, athletic associations, booster organizations, sports programs and events, and sports facilities and equipment at both the K-12 and higher education levels, but does not include case law involving physical education or intramural participation.

ELIGIBILITY

This section contains eight cases: one involved a student ruled ineligible because of misconduct; one questioned the use of grade point average as a criterion for participation; one challenged the results of a physical examination; one concerned outside participation; one denied a former professional athlete the opportunity to participate; and three involved the eligibility of transferring students.

Discipline

In an Iowa case, a high school student brought suit challenging a school board decision declaring him ineligible to compete on the wrestling team. At the time of the decision he had a nearly perfect record and was the defending state champion. Furthermore, he planned to attend college on a wrestling scholarship. The decision of the board was based on evidence that the plaintiff, plus three other male youths, engaged in multiple acts of sexual intercourse with a sixteen-year-old female student. Following an investigation, the principal concluded that the plaintiff had "committed a breach of discipline by engaging in conduct which interfered with the maintenance of school discipline and by engaging in behavior which was antagonistic to the rights of [named redacted] to attain her education."[1] The district court held that the plaintiff was provided with an appropriate hearing, the board's decision was not arbitrary or capricious and did not violate substantive due process, and the decision did not abridge the plaintiff's right to sexual privacy.

Grades

A school district rule requiring students to maintain a 2.0 (C) average in order to participate in extracurricular activities was challenged in a Montana case.[2] The state supreme court held that participation in such

1. Brands v. Sheldon Community School, 671 F. Supp. 627, 629 (N.D. Iowa 1987).
2. State *ex rel.* Bartmess v. Board of Trustees of School Dist. No. 1, 726 P.2d 801 (Mont. 1986).

activities is not a fundamental right and that neither the equal protection nor equal educational opportunity concepts were violated. The grade requirement operated as an incentive for those students who wished to participate and also allowed for additional study time for those who did not maintain the 2.0 average.

Medical Examination

In a unique case, a junior high school student brought suit against a school physician and district challenging the physician's determination that he was not physiologically mature enough to try out for the high school tennis team. The physician had simply followed the procedures and standards established by the state commissioner of education in evaluating the physiological maturity of athletes who want to participate at levels of competition above their own. As a result of being ruled ineligible, the plaintiff alleged negligence, negligent infliction of emotional distress, and medical malpractice. The state supreme court, appellate division, held that the student failed to state a cause of action.[3]

Outside Participation

In a case from the Colorado Court of Appeals, five members of the high school swim team challenged the state athletic association bylaw prohibiting outside competition. Specifically, the rule provides that players certified to participate as members of a high school sport may not compete on any other team, nor in any nonschool activity or event in that sport, during the season of that sport.[4] The athletes contended that this regulation violated their rights to freedom of association, due process, and equal protection. The court held that the rule did not prohibit the plaintiffs from associating and practicing with other teams; it merely required that they choose between competing on either the school team or a nonschool team during the season. Accordingly, the bylaw was not found to impermissibly burden the association rights of the plaintiffs. Furthermore, the appeals court agreed with the trial court that there was no constitutionally protected right to participate in interscholastic athletics, that the due process clause had not been violated, and that the rule rationally furthered a legitimate state purpose and therefore did not violate plaintiffs' right to equal protection.

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3. Sitomer v. Half Hollow Hills Cent. School Dist., 520 N.Y.S.2d 37 (App. Div. 1987).
4. Zunents v. Colorado High School Activities Ass'n, 737 P.2d 1113, 1114 (Colo. Ct. App. 1987).

Participation as a Professional

In June of 1980, the NCAA issued an official directive which declared that all Major Junior A ice hockey teams in Canada and the United States are professional teams within the meaning of its constitution and bylaws. The plaintiff in a Michigan case was a former participant in the Canadian league, but later wanted to attend the University of Michigan and play on the university intercollegiate team. An NCAA eligibility committee initiated a hearing and concluded that the plaintiff had played professionally and was therefore ineligible for intercollegiate hockey. On appeal, the Sixth Circuit held that the student was not denied his right to associate with professional hockey players; that the regulation did not infringe upon his father's constitutionally cognizable right to raise his son; and that the plaintiffs failed to allege that state university officials caused, directed, or controlled the implementation of the challenged rules.[5]

Transfer

In a Seventh Circuit, Illinois case, a private religious school challenged a high school association bylaw making a transferring student eligible for athletics only if he transferred from a private to a public school.[6] The school proposed that the regulation violated both the equal protection and due process clauses. The appeals court disagreed and held that the bylaw was rationally related to a legitimate purpose of placing public schools on equal footing with private schools in regard to student recruitment and that due process had not been violated. The plaintiff, as a private member institution, could have submitted amendments or proposals to the association, but had not done so and in fact had never attended meetings of the association's legislative body.

In a second transfer case, a Florida court permitted the retroactive application of an untimely "waiver form."[7] State association regulations permitted a transferring student to participate in athletics without meeting the one-year residency requirement only if the principals of the former school and the current school signed a waiver form. Because the form had not been signed by the time many of the games were played, the state association ruled the athlete ineligible and required the team to forfeit all of the games in which he played. The court enjoined the association from requiring forfeiture and from declaring the student

5. Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987).
6. Griffin High School v. Illinois High School Ass'n, 822 F.2d 671 (7th Cir. 1987).
7. Florida High School Activities Ass'n, Inc. v. Temple Baptist Church, Inc., 509 So. 2d 1381 (Fla. Dist. Ct. App. 1987).

ineligible. However, the court refused to address whether the bylaw was unconstitutional and reversed that part of the lower court decision without addressing the merits.

In Florida, an athletic associatizon rule states that "no student not attending his zoned school can participate in co-curricular activities without a waiver from the former principal" and that the "former principal can prevent co-curricular participation for the full four years the student is in high school." The plaintiff transferred for academic reasons (the school to which he transferred operated an ROTC program), but nevertheless was refused the opportunity to play basketball. A hearing officer overruled the principal's decision and stipulated only a one year loss of eligibility. The court went even further and concluded that the rule denied the student's right to establish eligibility by a rational basis.[8]

EQUALITY OF PROGRAMS

Prior to *Grove City College v. Bell*[9] the majority of the cases under this category would have been filed under title IX of the Education Amendments of 1972. Section 1681(a) of that statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance." Specifically in regard to sports, the Act requires that recipient programs provide equal athletic opportunities for members of both sexes. In determining if equal opportunities are being provided, a number of factors are considered: (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; and (10) publicity.

Title IX has not been used as a basis of suit in recent years, because the Supreme Court declared the law to apply only to recipient programs, and not to institutions. That decision has been controversial over the years, but was supported by the actual wording of the statute, the legislative history, and the fact that versions of the law prior to the enacted version required an institution-wide approach but were rejected. Notwithstanding the above, Congress has now passed the Civil

8. Staten v. Couch, 507 So. 2d 702 (Fla. Dist. Ct. App. 1987).
9. Grove City College v. Bell, 465 U.S. 555 (1982).

Rights Restoration Act which will "restore" the Act to institution-wide coverage. President Reagan vetoed the bill, but Congress overrode the veto.

Given the above, claims of inequality and sex discrimination in future years will again be based on title IX. Over the past few years, however, related cases were based on either the fourteenth amendment (middle-tier scrutiny) or state equal rights amendments (strict scrutiny). In 1987, there were only four related cases: two general; one dealing with the right of a girl to play on a boys' team; and one dealing with the right of a boy to play on a girls' team.

General

In a federal district court case out of Pennsylvania, a class of women student-athletes brought suit claiming sex discrimination in the intercollegiate athletic program at Temple University.[10] The court held that the university and its counsel were subject to sanctions for improperly communicating with plaintiffs and for discouraging plaintiffs from meeting with their counsel. The court required the university to provide a corrective notice to all female student-athletes to be distributed at defendants' expense, to pay costs and attorney fees resulting from the improper communication, and to pay a fine.

The Supreme Court of Washington examined a claim of sex discrimination under the state equal rights amendment against a state university.[11] The lower court found that the university had discriminated and awarded damages, injunctive relief, attorney fees, and costs. Plaintiffs and the defendant appealed the calculations and procedures of the court. The state high court held that the trial court was required to include the football program (revenues, scholarships, etc.) in fashioning a remedy. The lower court had excluded football from the determination of "equality" because it was viewed as unique among sports in the amount of revenue involved, the number of participants, the number of spectators, and media interest. The state supreme court ruled that this omission was in error. The court reasoned that the ERA obviously did not contain an exception for football and that such exclusion "would prevent sex equity from ever being achieved since men would always be guaranteed many more participation opportunities than women, despite any efforts by the teams, the sex equity committee, or the program to promote women's athletics under the injunction."[12]

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10. Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987).
11. Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987).
12. *Id.* at 1383.

Girl to Play on Boys' Team

The only 1987 case in this category involved a female elementary student who wanted to play tackle football. The Oregon Court of Appeals held the case moot, because the student had moved from the district.[13]

Boy to Play on Girls' Team

In a New Jersey case, a high school boy wanted to play on the girls' field hockey team and challenged his exclusion under the federal Constitution and state antidiscrimination law. The court held that the interscholastic athletic association regulation prohibiting his participation did not violate the federal equal protection clause, the state constitution, or state statute.[14] The association justified its policy by stating that it promoted equal athletic opportunities for females and that it helped redress the effects of past discrimination and disparate treatment relating to girls' athletics. The court noted that if boys were permitted to play on girls' teams, there would be a substantial risk that the boys would dominate and thereby displace the girls from those teams.

Enforcement of Rules

Membership

A division of the New York State Public High School Athletic Association brought suit against the association's executive committee for reversing its decision to deny full membership status to a private school.[15] According to association bylaws, nonpublic schools may petition for full membership or may simply compete as a "Friend and Neighbor." The latter status, however, does not permit the institution to vote on association business, or to participate in postseason championship competition. The private school in question had previously participated as a "Friend and Neighbor" and sought full membership. By a vote of fifty-one to thirty-three, the school was denied membership status. However, the executive committee overruled that decision by a vote of thirteen-to-six. On appeal to the state supreme court, appellate division, the court held that there was no administrative appeal to the executive committee from the result of a vote by the member schools.

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13. Pabst v. School Dist. No. 59, Eagle Point, 737 P.2d 151 (Or. Ct. App. 1987).

14. B.C. v. Board of Educ., Cumberland Regional School Dist., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987).

15. Section VI of the N.Y. State Pub. High School Athletic Ass'n, Inc. v. New York State Pub. High School Athletic Ass'n, Inc., 521 N.Y.S.2d 901 (App. Div. 1987).

Accordingly, the vote of the member institutions was final and the private school may not receive full membership.

Probation/Sanction

In a federal district court case, the University of Washington sought a preliminary injunction to prevent the NCAA from sanctioning the university because it failed to drug-test its athletes as a condition of eligibility.[16] Had the university continued in its efforts to drug test student-athletes, it would have violated a court order obtained by a student who claimed the requirement was unconstitutional. In spite of this previous court order, the court ruled in favor of the NCAA and claimed that the plaintiff had failed to show irreparable harm. The court also observed that a process existed by which the institution could obtain a hearing and, if necessary, an appeal from any attempted sanction.

Persons affiliated with the men's basketball team at Bradley University brought suit against the NCAA challenging its sanction.[17] The court held that the NCAA, by imposing sanctions against member institutions that violate association regulations, was not involved in state action. No due process, equal protection, or section 1983 violation was found to exist. Furthermore, the court held that current members of the team, who were not responsible for the violations, still did not have a protected property interest in postseason competition, gaining tournament experience, or securing professional careers in athletics.

In a related Mississippi case, the members of a high school baseball team sought an injunction prohibiting the one-year probation of the team.[18] The probation followed an incident where the school was required to forfeit a game because the coach, who had been ejected for arguing with the umpire, refused to leave the field. The court held that the student-athletes were not a party to the contract between the high school and the association and that neither their expectation of college scholarships, nor their interest in interscholastic athletics, created a property interest protected by due process.

TORT

In 1987, there were fifteen sport-tort cases: two intentional; thirteen negligence.

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16. O'Halloran v. University of Wash., 672 F. Supp. 1380 (W.D. Wash. 1987).
17. Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987).
18. Mississippi High School Activities Ass'n, Inc. v. Farris, 501 So. 2d 393 (Miss. 1987).

Intentional

Assault and Battery. A basketball player struck a second player with his fist. The injured athlete brought suit against the individual who struck him, the state of California, the university athletic director, and the basketball coach. A jury previously provided the injured player with a settlement of $25,000 from the person who struck him, but did not allow him to collect from the other named defendants. The lower court held that basketball players are not employees of the state and therefore recovery under the doctrine of respondeat superior was not permitted. A state court of appeals affirmed that decision and concluded that from the "standpoint of public policy consideration, exposing those institutions to vicarious liability for torts committed in athletic competition would create a severe financial drain on the [s]tate's precious educational resources."[19]

Defamation. This case emanated from New York State where a former high school coach brought action to recover damages, alleging that a letter and statements issued by the superintendent concerning a student-athlete's death were defamatory.[20] The student died while playing football, but had not taken the required physical examination nor had his parents signed a consent form permitting him to play. Following an investigation of the incident, the superintendent issued several letters of reprimand, and placed one of the letters in the coach's file. The superintendent also indicated publicly that she would officially reprimand each member of the coaching staff who had not followed district procedures. The court held that the superintendent was protected by absolute privilege with respect to the letters, and by qualified privilege with respect to the statements made to the press. Furthermore, the coach was unable to prove malice in his effort to overcome the qualified privilege defense.

Negligence

Negligence cases litigated in 1987 can be grouped into three categories: suits from participants and cheerleaders who were injured while participating or preparing to participate; suits from participants who were injured while en route to a game; and suits from spectators who were injured while in attendance.

Participants. The mother of a football player who became ill at practice and later died brought suit under section 1983 and the state

19. Townsend v. State, 237 Cal. Rptr. 146 (Ct. App. 1987).
20. Santavicca v. City of Yonkers, 518 N.Y.S.2d 29 (App. Div. 1987).

wrongful death statute.[21] The district court held that the action against members of the Board of Trustees of State Institutions of Higher Learning were barred by the eleventh amendment and that board members were entitled to qualified immunity for actions taken in their individual capacity. However, the mother was found to have stated a claim against the coach, the physician, and the trainer for negligence and breach of contract under state law. Accordingly, the motion to dismiss was granted in part and denied in part.

In a second football case, the player was performing an exercise referred to as "liners," requiring him to run wind sprints along the yard lines on the artificial turf inside the field house.[22] After completing a sprint, the plaintiff proceeded beyond the marked area and struck a wire-reinforced glass door with his foot. His foot and leg were seriously injured. The Ohio Court of Appeals held that the state university was not negligent in failing to replace the reinforced glass with safety glass and that the use of reinforced glass was not an absolute nuisance rendering the university liable for injuries.

In a third football case, the injured player (an Ohio resident) brought action against the University of Virginia claiming that he received improper medical care when his wrist was injured.[23] The Ohio Court of Appeals held that the university enjoyed sovereign immunity and that this action was one for personal injury and thus was governed by the tort statute of limitations (two years). The defendant's motion to dismiss was affirmed.

The final football, negligence case of 1987 involved a former student who sought to recover for medical expenses which he claimed were incurred in connection with treatment of his injury.[24] None of the claimed expenses were in connection with treatment by designated team physicians. The plaintiff was dissatisfied with the treatment provided him and elected to seek treatment elsewhere. Some of the expenses were incurred while the plaintiff was a student; other expenses were incurred after he had entered the work force. The Court of Appeals of Georgia held that the plaintiff failed to produce medical testimony to support his position that his prior injury was in fact the cause of his more recent physical infirmities.

In an Indiana case, a student sought to recover damages for injuries sustained while participating in recreational baseball practice.[25] All students interested in playing baseball were invited to participate. The

21. Sorey v. Kellett, 673 F. Supp. 817 (S.D. Miss. 1987).
22. Curtis v. State, 504 N.E.2d 1222 (Ohio Ct. App. 1986).
23. Barile v. University of Va., 507 N.E.2d 448 (Ohio Ct. App. 1986).
24. Eberhart v. Morris Brown College, 352 S.E.2d 832 (Ga. Ct. App. 1987).
25. Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987).

practice was conducted by members of the varsity team, but was not sponsored by the college. Notwithstanding the above, participants were permitted to use the baseball team's equipment and the dean of men provided the funds necessary to purchase baseballs. During a practice, the plaintiff was struck in the eye by a batted ball. The state court of appeals held that the college did not have a duty to supervise the activities and that the student who organized the practices was not an agent of the college. Accordingly, the college was not liable under the respondeat superior theory.

In a second baseball case, a high school outfielder claimed that school officials had been negligent for injuries he sustained when he collided with an infielder during practice.[26] The plaintiff claimed that the school failed to warn him of the danger of collision, failed to adequately and reasonably supervise the practice, failed to post sufficient personnel to watch for possible collisions, conducted the practice in an unreasonably dangerous manner, and allowed supervisory personnel to participate directly in the practice. The Supreme Court of Indiana held that the school district and the coaching staff breached a duty to exercise reasonable care in supervision, but that the athlete had incurred the risk of collision on the baseball field. Given the above, the decision of the lower court to grant summary judgment for the defendant was affirmed.

In a Kentucky case, a wrongful death action resulted from the electrocution death of a student-athlete who was using a whirlpool bath at the school.[27] The state appeals court held that the absence of a ground fault interrupter in wiring the whirlpool, as modified by the football coach, was the last and only substantial factor causing the death of the student. Given the aforementioned, the coach was solely liable for his negligent failure to install the interrupter as required by the national electric code.

In 1987, there were two negligence cases involving cheerleaders. In the first case, the plaintiff challenged a Texas statute that exempted school districts from tort claims.[28] The Court of Appeals of Texas held that the statute limiting liability of teachers violated neither the state constitution nor the fourteenth amendment and that the school district was entitled to governmental immunity.

In the second cheerleader case, a twenty-year-old college cheerleader sustained a permanent injury to her elbow during an unsupervised practice on astroturf.[29] The cheerleader was not warned of the dangers

26. Beckett v. Clinton Prairie School Corp., 504 N.E.2d 552 (Ind. 1987).
27. Massie v. Persson, 729 S.W.2d 448 (Ky. Ct. App. 1987).
28. Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290 (Tex. Ct. App. 1987).
29. Kirk v. Washington State Univ., 746 P.2d 285 (Wash. 1978).

of astroturf, which is harder than grass and results in more injuries. Plaintiff's injury to her elbow is permanent; she will have continued pain and arthritis in the area. She also became depressed and suicidal after the injury and spent over a month in a psychiatric ward. The state superior court entered judgment in favor of the cheerleader and awarded her over $350,000 in damages and both parties appealed. The Supreme Court of Washington affirmed the decision and concluded that the award was not so excessive as to shock the conscience of the court.

En Route to Game

In Louisiana, a van driven by a student athlete struck a pickup in a controlled intersection. The driver of the truck sued the university. The sole issue before the court was whether the institution could be held liable under either the doctrine of respondeat superior or a theory of direct negligence in selecting a driver for the van. The lower court had granted summary judgment to the university and that decision was affirmed on appeal to the Court of Appeal of Louisiana.[30]

In an unusual case, a female member of a tennis team was injured at a motel. She was running away from her teammates, who were involved in a water fight, and fell over a steep bank. The fall injured her knee. The Supreme Court of Appeals of West Virginia held in favor of the hotel and noted that there had been no prior falls in that area and that the athlete went running at full sprint into a dark, unlit area with her eyes unadjusted to the night.[31] Accordingly, she was ruled to have assumed the risk and to have contributed to her own injury.

Spectators

In the first of two spectator cases, an intoxicated student was injured when he vaulted over a four foot wall and fell thirty feet onto concrete steps. At the time, he was a patron at a football game at a university stadium. A New Jersey appeals court held that the university prohibited alcoholic beverages in the stadium and was not responsible for injuries resulting from violations of the prohibition.[32]

In Oregon, the plaintiff was injured at a basketball game when he was attacked by three students. The game was sponsored by the school districts and students from both schools were invited to attend. The Oregon Court of Appeals held that the plaintiff failed to allege facts indicating that the injury was foreseeable. As a result, the court affirmed the lower court decision dismissing the complaint.[33]

30. Nelson v. Ronquillo, 517 So. 2d 454 (La. Ct. App. 1987).
31. Ventura v. Winegardner, 357 S.E.2d 764 (W. Va. 1987).
32. Allen v. Rutgers Univ., 523 A.2d 262 (N.J. Super. Ct. App. Div. 1987).
33. Cook v. School Dist. U13J, 731 P.2d 443 (Or. Ct. App. 1987).

EMPLOYMENT

Thirteen cases affecting the employment of coaches, athletic directors, or athletes were decided in 1987. Of those cases, four dealt with adverse employment decisions, three concerned contract disputes, four were based on sex discrimination, one involved unemployment compensation, and one dealt with workers' compensation.

Adverse Employment Decisions

Within this grouping, adverse employment decisions were mixed in motive or were based on either immorality or insubordination.

General. In a California case, the former director of intercollegiate athletics at San Diego State University petitioned for a writ of mandate for reinstatement, back pay, a liberty hearing, and attorney's fees.[34] The termination allegedly was based on the plaintiff's inability to work with senior officials, her firing of university employees, her unfounded belief that she was to receive a pay raise, and her unsubstantiated belief that her office was bugged and that meetings were tape-recorded. A sexual-harassment complaint also had been filed against her, but the university claimed that the complaint was not one of the bases for the termination. The plaintiff claimed that her termination was in fact in response to her contacts with the press and her exercise of speech. A state court of appeal held for the university and concluded that the athletic director served at the pleasure of the university president and was not a permanent employee of the university. Accordingly, she was not entitled to the requested relief.

In a second case, the NCAA ordered the suspension of a state university basketball coach following a lengthy investigation.[35] The investigating committee identified thirty-eight rule violations, ten of which involved the plaintiff (Jerry Tarkanian). As a result, the committee directed the University of Nevada at Las Vegas to show cause why additional penalties should not be imposed if it did not suspend Tarkanian from involvement with the university's athletic program for two years. Tarkanian could continue as a professor or administrator, but simply could not be involved in athletics. The Supreme Court of Nevada held that the action of the NCAA was "state action" and required procedural due process. Furthermore, the coach was ruled to have a property and liberty interest in keeping his coaching position.

The Nevada court noted that the present case was distinguishable from those of the United States Supreme Court in *Rendell-Baker v.*

34. Hill v. Board of Trustees of the Cal. State Univ. Sys., 238 Cal. Rptr. 709 (Ct. App. 1987).

35. Tarkanian v. NCAA, 741 P.2d 1345 (Nev. 1987).

Kohn[36] (dismissal of a teacher by a private school) and *Blum v. Yaretsky*[37] (medicaid patients in private nursing homes) in that UNLV was a public institution. Also, in those cases the High Court recognized that state action may be present if the private institution exercised powers that were traditionally the exclusive prerogative of the state. In the present case, the state supreme court observed that the right to discipline public employees is traditionally the exclusive prerogative of the state and that the university could not escape its responsibility by delegating that duty to the NCAA.

Immorality. In an Oregon case, a girl's basketball coach was convicted of attempted, second-degree sexual abuse of a team member.[38] He allegedly touched the girl "on the thigh area and between her breasts." The coach appealed the jury decision and claimed that the indictment failed to state a crime. Specifically, state law defined "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party." Accordingly, to violate the statute, a sexual or intimate part must be touched *and* a sexual purpose must exist. In a previous case, the court interpreted this provision by stating that "[i]f the touching is not for sexual purposes, the sexual part is no less sexual and the intimate part is no less intimate, but the touching is not criminal."[39] The Oregon Court of Appeals concluded that neither the language nor the legislative history of the statute supported the position that either the human thigh area or the area between female breasts is an intimate part. Therefore, the court concluded that the indictment failed to allege a crime and that a demurrer should have been allowed.

Insubordination. In an Arkansas case, a head football coach was nonrenewed for failure to follow school policies and insubordination.[40] Among the specific charges was the coach's use of a volunteer assistant coach, in derogation of the instructions from the superintendent and the board, and in violation of state athletic association regulations. The issue before the appeals court was whether the lower court had erred in affirming appellee's nonrenewal without requiring proof of an intentional violation of school policy. Following a review of the facts of the case, the appeals court affirmed the lower court decision that the nonrenewal was not arbitrary, capricious, or discriminatory.

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36. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
37. Blum v. Yaretsky, 457 U.S. 991 (1982).
38. State v. Woodley, 746 P.2d 227 (Or. Ct. App. 1987).
39. State v. Turner, 575 P.2d 1007 (Or. Ct. App. 1978).
40. King v. Elkins Pub. Schools, 733 S.W.2d 417 (Ark. Ct. App. 1987) (en banc).

Contract Disputes

In 1987, three cases involved breach of contract claims: one affecting an assistant football coach, one involving a head basketball coach, and one brought by a sports agent. In the first case, an unemployed assistant football coach, who was "languishing in the brown waste of West Texas," was allegedly given an informal job offer in Hattiesburg, Mississippi.[41] The assistant proceeded to sell his home, request the transfer of his children's school records, and begin the process of looking for housing in Mississippi. Additionally, his wife quit her job. The head football coach allegedly told the plaintiff that he was his choice for the position and that he needed to formally interview for the job. During the visit, the plaintiff heard for the first time that his appointment had to be approved by the governing board, but felt at the time that the approval was a simple formality. Notwithstanding the plaintiff's impressions, the board did not support his appointment and a formal contract was never offered. The basis for the decision was an unfavorable recommendation by the university president who reportedly "did not like the appearance" of the applicant. The unsuccessful applicant sued claiming a breach of contract. The Mississippi Supreme Court held that neither the university nor the head coach was liable. In support of its decision, the court concluded that the head coach had not extended an employment contract to the prospective assistant and had simply invited him to interview with the understanding that he would support him for the position.

In Arizona, a head basketball coach sued the athletic director and university president for breach of contract, fraud, intentional interference with contractual relations, and intentional infliction of emotional distress. The state appeals court held that the athletic director was acting in his official capacity in recommending that the plaintiff not be rehired; that the recommendation did not constitute an intentional interference with plaintiff's contract; and that the athletic director did not intentionally inflict emotional distress upon the coach.[42]

The final contract case involved a professional football player and two sports agents.[43] Following a review of the events and facts of this case, the court noted that there was a "powerful inference" that the agreement between the player and the agent was actually post-dated and signed before or during the college football season. Notwithstanding this apparently post-dated agreement and the receipt of over $8,000 from the original agent, the player chose to be represented by another agent, who then negotiated his contract with the Green Bay Packers.

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41. Bruner v. University of S. Miss., 501 So. 2d 1113 (Miss. 1987).
42. Lindsey v. Dempsey, 735 P.2d 840 (Ariz. Ct. App. 1987).
43. Walters v. Fullwood, 675 F. Supp. 155 (S.D.N.Y. 1987).

The court held that the second agent was not subject to personal jurisdiction in New York for allegedly inducing the player in Alabama to breach his contract; that the player did not tortiously interfere with the agents' existing contractual relations; and that the agency agreement and promissory note executed in violation of NCAA rules were not enforceable under New York law.

Discrimination

In 1987 four suits were brought claiming discrimination; each alleged discrimination based on sex. One case involved a university employee, the other three were filed by school district employees. In the first case, a female academic coordinator for a university athletic department was discharged due to student complaints, improper advisement, and the pressuring of faculty to give athletes special consideration in grade assignment and make-up work.[44] The district court held that the reasons purported by the university were not a pretext to discrimination and that the plaintiff failed to establish that she was discharged because of her sex.

The Appellate Court of Illinois ruled on a case involving a female coach of girls' volleyball.[45] The coach alleged that she was a victim of sex discrimination because she was being paid less than males performing substantially equivalent coaching duties and was not provided an assistant coach, as were head coaches of boys' sports. The court disagreed with the plaintiff and held that the work was not substantially equal because of significant differences in time commitment. Also, the court noted that pay differentials between coaching positions for male and female sports were based not on the sex of the coaches, but rather the sex of the participants. Such a disparity was found to be valid as long as the differential was based on job responsibilities and requirements.

In a third sex discrimination case, a female physical education instructor brought action challenging the decision of school district officials refusing her the opportunity to become head football coach.[46] The court held that by not selecting the plaintiff as head coach the district "may have missed an historic opportunity and may in the process have violated its collective bargaining agreement,"[47] but had not discriminated based on sex. The appeals court concluded that the decision of the district court was not clearly erroneous in finding that the district had acted to fulfill a private contract with the former coach.

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44. Gray v. University of Ark., 658 F. Supp. 709 (W.D. Ark. 1987).
45. McCullar v. Illinois Human Rights Comm'n, 511 N.E.2d 1375 (Ill. App. Ct. 1987).
46. Oates v. District of Columbia, 824 F.2d 87 (D.C. Cir. 1987).
47. *Id.* at 93.

In the final case in this subsection, an Equal Pay Act suit was brought by the EEOC allegeding that female athletic coaches had been victims of sex discrimination.[48] The Seventh Circuit upheld in part a lower court finding that the district had violated the EPA, but that the violation was not willful, so as to extend the statute of limitations and allow recovery for one additional year of back pay. Furthermore, the court concluded that the plaintiffs had the burden of persuasion on a title VII claim in proving that the discrimination was deliberate.

Unemployment Compensation

In the sole case in this category, the plaintiff was a part-time soccer coach employed by Siena College. The season was approximately eight weeks long. For his work, plaintiff was paid a salary of $1,700. Following the season, the college informed the plaintiff that it would like to retain his services for the next season; he accepted. Two weeks later he filed for unemployment insurance benefits. The Unemployment Insurance Appeal Board affirmed an administrative law judge's decision that the plaintiff was entitled to receive benefits without disqualifying conditions. The employer maintained that the coach should not receive benefits because he was a professional athlete; that as a coach his position is analogous to that of a teacher applying for benefits during summer vacation; and that he did not serve in an instrumental capacity. The state appeals court held that the coach was not a professional athlete and was employed in an instructional capacity. Furthermore, the court distinguished the present case from those filed by teachers and noted that the plaintiff was seeking benefits during the academic year, rather than during the summer months.[49]

Workers' Compensation

In a South Dakota case, a basektball coach from Huron College sought workers' compensation allegedly due to a mental disability caused by circumstances within his employment (e.g., practice gear and game uniforms were stolen; three players had not graduated from high school, one was AWOL from the service, and two others were academically ineligible; a threat on his life; pressure to sign work-study forms when the players had not performed the work; location of his office in a storage area; condition of his office—water leaks and a falling ceiling; general discipline problems). He was diagnosed as having a possible

48. EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987).

49. *In re* Curto, 517 N.Y.S.2d 107 (App. Div. 1987).

organic brain disorder and was considered suicidal. He later jumped from a car, traveling fifty-five to sixty-five miles per hour, and was injured. The workers' compensation hearing officer found that his injuries were not compensable, and the coach appealed. The circuit court reversed and the college appealed. The state supreme court also reversed and held that a mental disability produced solely by mental stimuli or stress is not compensable under state law.[50]

MISCELLANEOUS

This year, the miscellaneous category includes cases on the use of an amusement tax, access to school and university records, and the collection of athletic fees.

Amusement Tax

The city of Morgantown, West Virginia sought a declaration that West Virginia University must collect the city's 2% amusement tax on the sale of tickets to university entertainment and athletic events. The court disagreed and held that the sports and entertainment events sponsored by the university were not conducted for private profit, and thus were not subject to the amusement tax.[51] In reaching its decision, the court observed that the word "private" means "intended for or restricted to the use of a particular person or group or class of persons" and requires that the recipients not be "freely available to the public." The court noted that in the present case, no individual person, company, or interest stood to profit from the events and the profits therefore were not private.

Public Records

In 1987 four cases were brought concerning the availability of public records; all were filed against universities. In the first case, two universities sought permission to intervene in litigation brought by other plaintiffs seeking documents from two voluntary university regulatory associations. The district court had denied the motion to intervene, and the universities appealed. The Fifth Circuit held that there was insufficient adversity of interest between the universities and the regulatory associations to allow the universities to intervene in the disclosure action.[52]

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50. Lather v. Huron College, 413 N.W.2d 369 (S.D. 1987).

51. City of Morgantown v. West Virginia Bd. of Regents, 354 S.E.2d 616 (W. Va. 1987).

52. Kneeland v. NCAA, 806 F.2d 1285 (5th Cir. 1987).

Southern Methodist University was involved in two actions in 1987 regarding access to records. In the first case, a newspaper and an assistant sports editor brought an action against the athletic conference seeking a declaration that the Open Records Act required the conference to divulge correspondence concerning allegations that selected NCAA member institutions violated association rules regulating recruitment of student athletes. The university filed a counterclaim seeking a declaration that the conference was not a governmental body and therefore not subject to the Act. The newspaper then declared a nonsuit of its action against the conference and moved to dismiss the counterclaim. The lower court dismissed the counterclaim and the university appealed. The state appeals court held that the declaration of nonsuit rendered the university's counterclaim nonjusticiable.[53]

In the second suit involving Southern Methodist University, as well as other private universities within the state of Texas, the court was required to determine whether the state Open Records Act applied to private institutions. The lower court had granted the institutions' motion for summary judgment and denied the newspaper's motion for partial summary judgment. On appeal, the court held that the schools were not governmental bodies subject to the Open Records Act and that the lower court had not abused its discretion in awarding attorney's fees to the universities.[54]

The final case involving the availability of public records emanated from a dispute in North Carolina. A press association and a newspaper publisher sought an order compelling the disclosure of specific reports prepared by chancellors of several universities within the University of North Carolina system. The reports included information and recommendations from the chancellors regarding intercollegiate athletics—including length of athletic seasons, number of contests, and recruitment practices. A lower court judge had ordered that the reports be made available for public inspection and the plaintiffs appealed. The appeals court held that the issue was now moot since the materials already had been made public.[55]

Student Athletic Fees

In the final case in this section and chapter, university students brought action challenging the transfer of student athletic fees from the board of regents to the athletic association. The complaint contained

53. Southern Methodist Univ. v. Times Herald Printing Co., 729 S.W.2d 129 (Tex. Ct. App. 1987).

54. A.H. Belo Corp. v. Southern Methodist Univ., 734 S.W.2d 720 (Tex. Ct. App. 1987).

55. North Carolina Press Ass'n, Inc. v. Spangler, 360 S.E.2d 138 (N.C. Ct. App. 1987).

four observations: (1) athletic fees are collected from each student and become state funds; (2) the board transfers the fees in a lump sum to the association; (3) there is no delivery of goods, services, or the like to serve as consideration for the transfer of the fees; and (4) the transfer of the fees violates the Georgia Constitution. The lower court had granted summary judgment to the athletic association and the students appealed. The state supreme court held that the transfer of fees was not a "gratuity," within the meaning of a state constitutional provision prohibiting the granting of any donation or gratuity of state funds. The court concluded that the transfer of funds was permissible because of the substantial benefits received by the university from its relationship with the association.[56]

56. Haggard v. Board of Regents of the Univ. Sys. of Ga., 360 S.E.2d 566 (Ga. 1957).

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FINANCE

Bruce Beezer and Bettye MacPhail-Wilcox

Introduction / 198
Public Funds for Private Schools / 199
Sources and Allocations of Public School Funds / 200
- State School Finance Programs / 200
- Funds for Special Education / 208
- Federal Funds for Education / 209
- School Fees / 212

School Tax Issues / 212
- Use of School Tax Base Revenues / 212
- Tax Elections / 213
- Tax Revenue Disbursement / 214
- Bond Issuance / 214
- Delinquent School Taxes / 215
- School Tax Exemptions / 216
- Uses of Revenue / 218
- Conflict of Interest in School Funding / 220

INTRODUCTION

There were no United States Supreme Court decisions this year on either public or private school finance. There were, however, a number of federal appellate court decisions. One decision ruled on the constitutionality of a state's school finance law. Another case concerned federal reimbursement for state expenses used for the education of handicapped children. Finally, three decisions considered refunds of misspent and overallocated federal grant funds.

During this reporting period, state courts litigated cases concerning disputed state aid calculations, special education funding, and fees for school bus transportation. School tax cases dealt with the use of school tax bases for noneducational purposes, bond referenda, tax exemptions, tax delinquency, the use of revenues, and conflicts of interest in public school funding decisions. Finally one state supreme court advisory opinion considered the use of public funds for private schools.

PUBLIC FUNDS FOR PRIVATE SCHOOLS

The Supreme Judicial Court of Massachusetts, in response to a question proposed by the state Senate, said that a proposed bill would violate section 2 of article 46 of the Articles of Amendment to the Constitution of the Commonwealth.[1] The bill was to allow taxpayers an income tax deduction of $1,000 for each dependent in grades kindergarten through six and $1,500 for each dependent in grades seven through twelve who attended a public or nonprofit private school. The deduction was for tuition, textbooks, transportation, and certain tutoring services. The court first noted that the opinion only concerned section 2 of article 46 and was not ruling on a possible violation of the first amendment of the United States Constitution. In a footnote,[2] the court said that section 2, called the anti-aid amendment, was much more specific than the first amendment. Therefore, the United States Supreme Court's decision in *Mueller v. Allen* need not enter into the analysis.[3] The court then set out three criteria from previous decisions interpreting section 2 to determine its response to the submitted question. The first criterion was whether the purpose of the bill was to aid private schools. The court regarded the tax deduction as an intent to aid private schools because public school parents are not charged tuition and their children receive free textbooks. "Therefore, the benefits . . . would flow exclusively to those taxpayers whose dependents attend private schools and, as a result, to the private schools themselves."[4] The second criterion was whether the bill would result in substantial aid to private schools. The court noted that the bill would violate this criterion because it requires a tax subsidy to private schools and would substantially reduce the Commonwealth's tax revenue. The court believed these effects were possible because of the large student enrollment in private schools. The court then argued that the proposed bill also would violate the third criterion, political and economic abuse. Article 46, section 2 was enacted to halt, the court said, "the politically divisive and financially wasteful practice of direct aid to private schools and institutions."[5] The enactment of the proposed tax deductions, therefore, would reduce the financial cost to those parents who sent their children to private schools and, thereby, afford direct aid for the continuance of private schools.

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1. Opinion of the Justice to the Senate, 514 N.E.2d 353 (Mass. 1987).
2. *Id.* at 354 n.4.
3. 463 U.S. 388 (1983).
4. Opinion of the Justice to the Senate, 514 N.E.2d 353, 356 (Mass. 1987).
5. *Id.* at 358.

SOURCES AND ALLOCATIONS OF PUBLIC SCHOOL FUNDS

State School Finance Programs

State courts in North Carolina and Oklahoma, and the Court of Appeals for the Fifth Circuit, issued opinions regarding the constitutionality of present statutory systems of financing public schools. There were four decisions on issues related to New York's tax law. The Supreme Court of Wyoming ruled on the constitutionality of a statute calling for withholding funds for underassessment. A Pennsylvania decision decided the constitutionality of setting minimum and maximum increases in state subsidies to school districts. A California court ruled on excess funds being used to reduce state apportionment the following fiscal year.

The North Carolina Court of Appeals ruled that the statutory system for financing public education was not a violation of the state constitution.[6] In an action seeking declaratory and injunctive relief, parents of a local school district alleged that the school finance law caused inequities in educational programs and facilities. The parents contended that the law disfavored those counties with a relatively low tax base in contrast to those counties with a higher tax base. A second allegation was that permitting the existence of five separate school systems in the county prohibited the effective use of facilities and staff and, thereby, promoted inequitable use of state and local funds. These conditions, the plaintiffs contended, result in the denial of equal opportunity to a free public education.[7] The plaintiffs reasoned that the present statutory scheme is unconstitutional "because it requires the [s]tate to provide flat rate grants to local . . . units based solely upon the average number of pupils in attendance, without taking into account other factors affecting the units' needs for financial assistance."[8] Some of the other factors were responsibility for building, maintaining, and improving facilities and other educational services. Furthermore, the existence of five school systems in the county fragments the total school population so that students in one system are afforded educational programs unavailable to students in other systems in the same county.

The court first noted the similarity between the 1970 approved article IX, section 2(1) of the North Carolina Constitution and the one adopted in 1868. The only change was the removal of the language that mandated separation of the races. The court stated that the framers' commentary regarding the change clearly showed they had no intent to alter the school finance scheme; rather, the real intent was to make all

6. Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App. 1987).
7. N.C. Const. art. IX, § 2(1) (1970).
8. Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432, 434 (N.C. Ct. App. 1987).

schools accessible to every student regardless of race. The court also noted another constitutional provision that contradicted the plaintiffs' allegations of equal funding. The provision requires "proceeds of all penalties and forfeitures and of all fines collected in the several counties of any breach of the penal laws of the state, shall belong to and remain in the several counties . . . and used exclusively for maintaining free public schools."[9] This provision, the court reasoned, further showed that financial disparities between counties for public schools were not necessarily a constitutional violation.

The next issue addressed by the court was the nature of the guarantee inherent in the constitutional requirement that "equal opportunities shall be provided for all students" found in article IX, section 2(1). Noting the need to remove the "separate but equal" phrase from the 1868 Constitution, the court stated that the framers of the change and voters were aware that racial segregation in North Carolina was over, and the new provision of "equal opportunity" was to assure only equal access to schools for all students. "Any other interpretation," the court believed, "would require drawing inferences and conclusions that not only cannot be supported, but are, in fact, contradicted by the history surrounding the adoption of the Constitution."[10] The court indicated that if any changes were necessary, it was a legislative matter.

The Oklahoma school finance scheme was found not to violate either the United States Constitution or the Oklahoma Constitution by the Oklahoma Supreme Court.[11] The plaintiffs, a group that included the boards of education of thirty-eight school districts, alleged that the disparaties in the taxable wealth between school districts affected the fiscal ability of poor districts to provide their students with resources and opportunities comparable to those of wealthier districts. These differences are caused, they claimed, by the overreliance on the ad valorem tax and the state aid formula. The court, in a comprehensive decision, first considered the plaintiffs' challenge to Oklahoma's system of ad valorem taxation. The plaintiffs contended that the assessment rates were different from county to county, and that county assessors had not used a standard method in valuing property. Noting it had ruled on the issues relating to assessment procedures since 1975, the court stated that "all counties of the state have established assessment ratios within the guidelines set by this court, and the present [s]tate [a]id formula is designed to minimize the effects of any actual variance in the ratios among the counties."[12]

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9. N.C. Const. art. IX, § 7 (1970).
10. Britt v. North Carolina State Bd. of Educ., 357 S.E.2d, 432, 436 (N.C. Ct. App. 1987).
11. Fair School Finance Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987).
12. *Id.* at 1143.

As to the plaintiffs' challenge that the Oklahoma school finance law violated the equal protection clause of the fourteenth amendment, the court first reviewed in detail the United States Supreme Court decisions in *San Antonio Independent School District*[13] and *Plyer v. Doe*[14] to explain why education was not a fundamental right under the equal protection clause, and why providing a student with an opportunity to acquire the basic skills to be a functional citizen met the rational relationship standard. The court then considered the plaintiffs' specific claims that before the *Rodriguez* rationale could be used certain factual information must be determined: (1) whether there was a legitimate, articulated state purpose to the Oklahoma system, and (2) whether there was any rational relationship between such purpose and the present method of financing public education.[15] Although the plaintiffs claimed the purpose of the school aid program is "to provide the best possible educational opportunities for every child,"[16] the court said there was nothing in the statute that mandated equalization of funding. The court regarded the current finance system to be rationally related to the strong statutory emphasis on local control because it allowed local districts flexibility in deciding what amount of money is spent on education.

Another issue raised by the plaintiffs was that *Rodriguez* was inappropriate as precedent because of the differences between the school finance laws in Oklahoma and Texas. The differences were that the Oklahoma Constitution limited the amount of ad valorem tax that could be imposed for the general operating and building funds, and imposed an indebtedness ceiling for any one year. The court ruled that these restrictions did not render the Oklahoma system unconstitutional because the equal protection clause did not require a state's school financing system to guarantee equal expenditures per child.[17]

The plaintiffs' third argument was that since education is mentioned in the state constitution, it is a fundamental right and, therefore, strict scrutiny must be used to determine whether the method of financing public education violates state equal protection rights. The court rejected the argument by ruling that the sections pertaining to education in the constitution "merely mandate actions by the Legislature to establish and maintain a system of free public schools. They do not on their face guarantee equal expenditures per pupil."[18] Also, the court said that

13. 411 U.S. 1 (1973).
14. 457 U.S. 202 (1982).
15. Fair School Finance Council of Okla., Inc. v. State, 746 P.2d 1135, 1146 (Okla. 1987).
16. Okla. Stat. tit. 70, § 18-101 (1981).
17. Fair School Finance Council of Okla., Inc. v. State, 746 P.2d 1135, 1147 (Okla. 1987).
18. *Id.* at 1149.

since the legislature acted within its powers and the plaintiffs failed to show that it acted arbitrarily or capriciously in establishing the finance system, it had no authority to apply the strict scrutiny standard.

The continued significance of the *Rodriguez* decision was evident in a Fifth Circuit Court of Appeals opinion affirming a district court's action which granted summary judgment for the state of Louisiana relative to a challenge to its school finance law.[19] The court held that the law was not a violation of the equal protection clause of the fourteenth amendment. The law mandates each parish to contribute towards the minimal cost of its students' education based on the parish's current assessed value of property. The rational relationship standard used in *Rodriguez* was utilized by the court to analyze the plaintiffs' three arguments against the way state funds were allocated to the parishes.

The first argument by the plaintiffs was that the equalization aspects of Louisiana's Minimum Foundation Program (MFP) formula results in an arbitrary rather than an equalizing effect because it reduces the state's contribution to each parish by the amount of income that can be obtained by the local ad valorem tax. The court regarded the MPF formula as one that calculates the total cost of providing every student in the district the educational services (state-mandated teacher and student ratio, special education costs, insurance, utilities, supplies) that the state requires to educate students. This cost is then reduced by the local funds raised by a uniform ad valorem property tax. The net effect of the MPF formula, with regard to cost, indicated to the court that the state attempts to provide the same education services to all students. Even though there may be disparities in actual dollar amounts, the court stated "the relevant comparison between parishes is not the state MFP dollar contribution per student in each, but rather the percentage of the total MFP cost per student which the state bears in each parish respectively."[20]

The plaintiffs' second claim was that the equal protection clause required the MFP formula to calculate educational costs in a way that accounts for substantially all the sources of interdistrict disparities caused by local funding ability, instead of a predominantly per capita, across-the-board basis. The court found this argument unpersuasive. The court further held that the current MFP formula attempts to achieve two competing but legitimate goals of assuring each student a basic education and maintaining some local autonomy over education because the formula provides a basic education to all students by allocating funds on the basis of school membership and, without eliminating all

19. School Bd. of the Parish of Livingston v. Louisiana State Bd. of Educ., 830 F.2d 563 (5th Cir. 1987).

20. *Id.* at 570.

disparities between parishes, the formula gives local boards flexibility and incentive to supplement state funds.

The third argument by the plaintiffs was that the formula used to distribute a revenue-sharing fund discriminated against those parishes that have a high percentage of property classified as homestead. This property is tax exempt in Louisiana, and the revenue-sharing fund is to offset tax losses caused by the exemption. The court regarded the 80% per capita and 20% per household method for allocating these funds as rationally related to the fund's purpose. The court said that it "is not unreasonable for the state to suppose, as the formula does, that parishes with larger concentrations of populations and homesteads will generally lose more property tax revenues due to the homestead exemption than will less populous parishes."[21] The court concluded by holding that all three of the plaintiffs' arguments failed to prove that the Louisiana school finance scheme violated the equal protection clause.

Cases concerning the impact of state legislative enactments on the calculation of state aid to local school districts were the subject of court decisions in New York, Wyoming, Pennsylvania, and California. A New York statute created a tax assessment study commission whose implementing actions affected the tax base on which state aid was calculated.[22] State aid to school districts in New York is equalized by a formula which distributes funds in inverse proportion to the combined adjusted gross income of school district residents. Taxpayers are required to identify their school district of residence with a three-digit code on their state income tax return. Inaccuracies and inefficiencies in the system led the Legislature to establish a task force instructed to work cooperatively with a sample of school districts to validate and correct the adjusted gross income reports. The statute also mandated the establishment of: (1) procedures to improve the accuracy of district income data; (2) a method for determining where the incidence of incorrect reporting was greatest; (3) a process by which local school districts could review residence data used to compute state aid; and, (4) an appeals process for school districts.[23]

Twenty-two districts were identified as participants in the pilot study. Early findings from the study, suggesting that 30 to 55% of the addresses reviewed were incorrect, led the task force to recommend that 1983 income data be used to calculate 1985-86 state aid; however, school aid authorities did not adopt this recommendation. Brentwood Union Free School District was not one of the twenty-two districts designated to participate in the pilot study; however, the neighboring

21. *Id.* at 572.
22. 1984 N.Y. Laws § 3 C889.
23. *Id.* at § 2.

Bay Shore district was. Bay Shore reported to the state that 4,000 taxpayer addresses attributed to them were in fact residents of the Brentwood district. The state subsequently reduced state aid to Brentwood and increased aid to Bay Shore in 1985-86. Brentwood sought a declaratory judgment alleging that the enabling legislation did not empower the state to unilaterally and selectively reduce its educational aid.[24] Brentwood contended it had not been afforded the opportunity to review the additions to its tax base, challenge them, or appeal the decision. The state argued that the issue was not a proper declaratory judgment action and sought a change of venue. The Supreme Court of Suffolk County disagreed with the state, and held that the manner in which the statute was implemented had denied Brentwood of its rights. The court asserted that while it might have been appropriate to adjust the aid of the twenty-two pilot districts, it was not appropriate to adjust the aid to neighboring districts that were not participants of the pilot study. Furthermore, Brentwood was not afforded a list of addresses challenged by Bay Shore, thus denying them the opportunity to examine or appeal the challenged addresses. The state claimed that sending the income tax data to Bay Shore constituted an appeals process. The court disagreed noting that "a[n] 'appeal' in the usual sense given to the word is an action commenced by a party who believes himself to be aggrieved (school district) to a party in a position to correct the sensed grievance (the taxing authorities)." The court observed that it was not reviewing the legislature's wisdom or the propriety of its actions, but Brentwood's challenge is "to the imprecise, unfair, unfinished, incomplete program" designed by the task force. The opinion noted that the actions of the task force seemed intent upon changing the entire state aid formula in an arbitrary manner. Brentwood was awarded summary judgment and the court ordered that: (1) the state aid formula for 1985-86 and 1986-87 be recalculated without giving effect to the Bay Shore verification; (2) the state reimburse Brentwood accordingly; (3) the state be enjoined from using the proposed system until an appeals process was established and verified data were made available to Brentwood.

Implementation of the same statute was contested by the Peekskill School District.[25] However, Peekskill was one of the twenty-two pilot districts whose tax base was under scrutiny. Data collected by the task force were used to reduce Peekskill's state educational aid by $1.2 million. Though the task force submitted a list of 1983 residents to the district superintendent with instructions to verify it and make corrections, the superintendent claimed that 2,352 out of the 9,012 taxpayer

24. Brentwood Union Free School Dist. v. State, 517 N.Y.S.2d 996 (Sup. Ct. 1987); *see also* Dumain v. Carey, 519 N.Y.S.2d 17 (App. Div. 1987).

25. City School Dist. of the City of Peekskill v. State, 518 N.Y.S.2d 748 (Ct. Cl. 1987).

addresses provided him should not have been attributed to the school district. Adjustments to Peekskill's state aid resulted in a shortfall of $1.233 million in 1984-85. The district claimed that 1983 income data had been improperly used to compute state educational aid, and argued that income data for two years prior to the calendar in which the current school year commenced was the proper basis for computing their aid—not the corrected 1983 data. The court of claims dismissed the case observing that the district should seek relief in the legislature, not the courts.

Another New York school district brought suit for an interpretation of the appeals process of the finance law.[26] The appeals process was established to resolve disputes between school districts and the Department of Taxation and Finance regarding state aid. The district argued that the statute should be interpreted to allow all school districts to use the process, not just the twenty-four selected school districts. The court granted summary judgment for the state on the basis that the purpose of the law was to create a temporary task force to investigate the difficulties previously experienced in matching taxpayers' addresses on income tax returns and the appropriate school districts. The criterion that determined the selection of the twenty-four districts was that they had immediate effects of overreporting of income under the finance law. The court concluded that the selection of the participating districts was rational and not a violation of equal protection rights.

The calculation and distribution of state funds based on tax assessment data were disputed in a Wyoming case. Wyoming has an equalization plan for funding schools, and the state statute requires the local school board to report when local assessments differ from those of the Board of Equalization. The State Board of Equalization notified the Superintendent of Public Instruction in Wyoming that five counties were underassessed, whereupon the state superintendent reduced the foundation program allotment to these counties. Laramie County School District Number One filed suit against the State Department of Public Instruction. The superintendent alleged that the district had not filed a correction claim with the state auditor as required by the statute. The trial court granted summary judgment to the state, and the district filed a motion to amend the lawsuit. The motion was granted, and the district argued that it was unconstitutional to reduce state aid because the county assessor underassessed property in the county. Laramie County School District was awarded judgment for the full amount of the withheld funds, whereupon the state superintendent and members of the Wyoming Board of Education appealed. The state supreme court af-

26. Kneale v. Cuomo, 518 N.Y.S.2d 220 (App. Div. 1987).

firmed the trial court decision, observing that the right to an education cannot be conditioned on wealth.[27] The court stated that because education is a fundamental interest under state law, strict scrutiny criteria must be applied whenever funds are withheld because of transgressions of other segments of government.

A Pennsylvania school district was denied a motion for summary judgment challenging the constitutional provisions of a school finance statute that set minimum and maximum increases for state subsidies to local school districts.[28] A 1983 statute established a limit of a 7% increase over a previous year's state aid and assured at least a 2% increase. The legislature also had enacted a statute guaranteeing that no district would receive less than 80% of its entitlement for the 1983-84 and 1984-85 school years. The district alleged that the provisions had no rational relationship to a legitimate governmental purpose and were a violation of federal and state equal protection rights. The district argued that the actual effect of the provisions would protect a district with a significant decline in enrollment, even though its overall aid entitlement under the general aid formula would decrease. In contrast, a district with a major enrollment increase would be limited to a 7% increase, when it was entitled to a greater increase under the general aid formula. The district claimed that this kind of effect was irrational and would not advance a legitimate state purpose. The court reasoned that the 2% floor protected those districts with a significant decline in enrollment from a decrease in state aid, and would, therefore, help those districts maintain a required education program. The 7% ceiling was a reasonable means, the court said, to assure protection of state "available funds from theoretically unlimited entitlements and thereby ensure the adequate funding of the statewide public school system."[29] The court concluded that these results had a reasonable relation to the Pennsylvania legislature's constitutional mandate to assure a thorough and efficient public school system.

A California Court of Appeals reversed a superior court's decision to grant a writ of mandate to a county superintendent of schools.[30] The issue before the court was the proper interpretation of two sections of the California Education Code. One section contains the specific formula for calculating state aid to each county superintendent of schools.[31] The other section establishes rules for carry-over funds. It states that "revenues received pursuant to [s]ection 2558, and any ending balance

27. Simons v. Laramie County School Dist. No. One, 741 P.2d 1116 (Wyo. 1987).
28. Bensalem Township School Dist. v. Commonwealth, 524 A.2d 1027 (Pa. Commw. Ct. 1987).
29. *Id.* at 1030.
30. Canale v. Honig, 239 Cal. Rptr. 780 (Ct. App. 1987).
31. Cal. Educ. Code § 2258.

from the prior fiscal year from state or local revenues may be used by the county superintendent for any of the programs operated by the county office."[32] The court ruled that section 2558 controls all other sections in the statutory scheme. Since it states that excess revenues from any source may be deducted from the fiscal entitlement of the next year, the state did not violate any law by reducing the apportionment for the succeeding fiscal year.

Funds for Special Education

The following cases concern only the fiscal and revenue aspects of funding for special education programs. The substantive and remedy issues are dealt with in the chapter on "Handicapped." The court decisions in this section deal with the disallowing of state aid, paying excess costs for placement in a state-operated school, paying for residential summer school attendance, and allocating costs between title XX of the Social Security Act and state special education funds.

The California Court of Appeals upheld the constitutionality of section 59300 of the California Education Code.[33] That section requires a school district to pay 10% of the "excess annual cost" for educating in a state-operated school a student whose parents live within the district. The district contended that section 59300 was a violation of article XIIIB, section 6 of the California Constitution, which forbids the state from requiring a local government agency to provide a new program or higher level of service without providing reimbursement. The court held that section 59300 did not create a new program or higher level service, but shifted 10% of the excess costs for attendance, and that the state-operated school was not a new program or a higher level of service since the state already offered the services.

The importance of accurate records was made clear in a New York court decision that upheld an order to recoup costs payed by the state to a local district.[34] The controversy involved state aid distributed through a Board of Cooperative Educational Services (BOCES). The state comptroller determined that the plaintiff had not "fully shared" the resource rooms required by an agreement with students from other districts. The court found that the district's evidence lacked any credibility. The records were handwritten and appeared to be only lists of student attendance in the resource rooms. The lists lacked any indication they were "official records."

A Pennsylvania school district was ordered to pay the costs asso-

32. Cal. Educ. Code § 2258.5.
33. Lucia Mar Unified School Dist. v. Honig, 233 Cal. Rptr. 531 (Ct. App. 1987).
34. Lakeland Cent. School Dist. of Shrub Oak v. State Dep't of Educ., 522 N.Y.S.2d 304 (App. Div. 1987).

ciated with placing an emotionally disturbed student in a residential summer school.[35] The evidence showed that the student had difficulty readjusting to a residential school setting after spending the summer with her parents. The court reasoned that social as well as academic regression can happen in emotionally disturbed students who experience extended interruption in their education program. Even though the student's classroom performance was satisfactory during the regular school year, the court concluded that the school district should pay the costs of residential summer school. The court held this appropriate because achieving the stated purpose of the student's program, progress toward self-sufficiency, was hampered by the emotional adjustments she had to make each time she returned from the extended summer vacation.

The availability of funds under title XX of the Social Security Act[36] for reimbursement of state money expended in the operation of three state residential schools for handicapped children was ruled on by the Seventh Circuit Court of Appeals.[37] The secretary of the Department of Health and Human Services disallowed the state of Illinois' claim under title XX for educational services ($6,311,908) and for room and board ($2,792,804). The court, in affirming the secretary's ruling, noted the language of the Social Security Act that prohibits funding for "any educational service which the *[s]tate* makes *generally available* to its residents without cost and without regard to their income."[38] The plaintiff argued that the limitation did not apply because the services provided at the residential schools were specially designed for blind, deaf, and hospitalized students and therefore not "generally available" through local school districts. The court rejected the argument and ruled that the educational services provided at the residential schools were part of the state's free public education for handicapped students.

Federal Funds for Education

The importance of the United States Supreme Court decision in *Bell v. New Jersey*, which held that the United States has "a right to the amount of any funds overpaid,"[39] was again the issue in three cases.[40] In

35. Bucks County Pub. Schools v. Department of Educ., 529 A.2d 1201 (Pa. Commw. Ct. 1987).

36. 42 U.S.C. §§ 1397-1397f.

37. Illinois v. Bowen, 808 F.2d 571 (7th Cir. 1986).

38. 42 U.S.C. § 1397a(a)(10) (emphasis in original).

39. 461 U.S. 733, 783 (1983).

40. *See* The Yearbook of School Law 1984 at 225; The Yearbook of School Law 1985 at 234; The Yearbook of School Law 1986 at 210; and The Yearbook of School Law 1987 at 216.

a fourth case, a federal appeals court ruled on an impact aid issue.

The Ninth Circuit Court of Appeals denied the California Department of Education's petitions for review of two final decisions by the United States Secretary of Education.[41] The issue involved the refund of more than a quarter million dollars because certain conference expenses were improperly charged to the title I program. The state's primary contention was that the secretary used an improper legal standard in determining that the expenses were not chargeable to title I. The secretary interpreted the regulations to require a conference, as a whole, had to be "directly related" to title I concerns and have as its "primary purpose" the dissemination of technical information relative to title I programs in order to receive funds.[42] The state argued that this interpretation violated the intent of title I to preserve state and local control. The court regarded the state's argument meritless because Congress had authorized the secretary to adopt appropriate regulations for title I, and the secretary's subsequent interpretation should be given substantial deference. The secretary's conclusion, that payment for conferences specifically intended to serve title I needs, was regarded by the court as reasonable.

In another opinion, the Ninth Circuit again denied a California Department of Education's petition to review a holding by an education appeal board.[43] The state was appealing the return of $10,302,130 for overallocated federal funds granted for the migrant education program. The state argued that the secretary lacked authority to demand overallocated funds beyond the fiscal year in which they were granted because the regulations limit refunds to audits conducted in the grant year.[44] The court rejected the argument, ruling that the regulation cited by California only "describes the means by which surplus funds may be reallocated to where they are needed, not whether the federal government may recover funds that a state had no right to receive in the first place."[45]

Petitions for review were granted by the Fifth Circuit Court of Appeals to four parish school boards in Louisiana.[46] The secretary had determined that the boards were in noncompliance with requirements for grants under the Bilingual Education Act (title VII).[47] Three of the parish boards claimed that under title VII a final audit determination

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41. California Dep't of Educ. v. Bennett, 833 F.2d 827 (9th Cir. 1987).
42. 45 C.F.R. § 116.36 (1976).
43. California Dep't of Educ. v. Bennett, 829 F.2d 795 (9th Cir. 1987).
44. 34 C.F.R. § 204.22 (1982).
45. California Dep't of Educ. v. Bennett, 829 F.2d 795, 798 (9th Cir. 1987).
46. Tangipahoa Parish School Bd. v. United States Dep't of Educ., 821 F.2d 1022 (5th Cir. 1987).
47. 20 U.S.C. §§ 3221-3262.

cannot be made before an actual audit is done for each of their programs. The court, after an extensive review of the facts, concluded that no actual audits had been conducted because the visits by federal officials were no more than "abbreviated inspections." The Office of Investigations' agents had not prepared detailed studies of the programs, nor conducted meetings between themselves and school personnel, and failed to allow school officials to review and respond to any conclusions made during the visit. The court remanded the petitions to the Department of Education for further review consistent with its observations regarding the failure to conduct a complete audit.

The fourth parish bilingual program was considered to have had an actual audit. The results showed fewer than 60% of the students in the bilingual program qualified under the language achievement test. Also, many of the students in the program did not come from homes where the primary language was other than English. The court, however, found merit in the board's position that refunding the entire grant ($477,100) would not further the purpose of title VII. On remand to the secretary, the court said the amount to be refunded should be only for those students found ineligible for the bilingual program.

The appropriateness of the $50 rule used by the secretary to determine the amount of impact aid a school district can receive may be finally resolved by the Federal District Court of Appeals.[48] A federal district court in California made an oral opinion declaring the $50 rule invalid. The Ninth Circuit Court of Appeals reversed that decision.[49] The school board appealed to the United States Supreme Court which summarily disposed of the case by vacating the Ninth Circuit's judgment, and remanded with instructions to transfer the case to the Federal Circuit.[50]

The $50 rule is a thirty-year-old rule used by the secretary to aid in evaluating claims of comparability between the average per pupil expenditure in districts seeking impact aid funds and the average per pupil expenditure in other districts regarded by the applicant as comparable in "local effort." The comparison of "local effort" is "determined by dividing the total revenues for current expenditures obtained solely from local sources by the number of nonfederal children. A proposed LCR, local contribution rate, generally will not be approved if it exceeds an LEA's local effort by more than $50.[51] The purpose of the rule is to ensure that impact aid payments are related to what a district spends to

48. Cula Vista City School Dist. v. Bennett, 824 F.2d 1573 (Fed. Cir. 1987); The Yearbook of School Law 1988 at 213.

49. Cula Vista City School Dist. v. Bennett, 762 F.2d 762 (9th Cir. 1985).

50. 106 S. Ct. 876 (1986).

51. Cula Vista City School Dist. v. Bennett, 824 F.2d 1573, 1577 (Fed. Cir. 1987).

educate its students without regard to the impact of federal sponsored activities.

The appeals court disagreed with the district court's reasoning that the $50 rule limited comparison to just local effort, and concluded that the lower court had failed to take into consideration other factors such as tax resources and kind of students. The appeals court stated that the legislative history of the Impact Aid bill indicated Congress authorized consideration of tax resources and tax effort. In addition, the $50 rule eliminates the distortion of local revenues caused by the presence of the federal government by dividing current expenditures from local revenues by the number of nonfederal children.[52] The court of appeals concluded that the secretary made a reasonable interpretation of the statute by using "local effort" as a criterion to determine comparability between districts.

School Fees

Only one case pertaining to school fees was litigated during this reporting period. In North Dakota, parents sought to enjoin Dickinson Public Schools from collecting school bus transportation fees. They charged that the practice violated the constitutional article mandating a uniform system of free public schools.[53] A district court held that the state constitution did not require the state or school district to provide free transportation for students, and dismissed the case. The parents appealed, and the Supreme Court of North Dakota affirmed the lower court decision.[54] The court pointed to the existence of an authorizing statute[55] and noted that the case involved neither a suspect classification nor a fundamental or substantive right. Using the rational basis test, the court concluded that the fees were authorized by statute and were rationally related to a legitimate government objective of allocating limited resources.

SCHOOL TAX ISSUES

Use of School Tax Base Revenues

School tax cases dealt with the use of school tax bases for noneducational purposes, tax elections, and the disbursement of tax revenues. Other cases concerned bond referenda, delinquent school taxes, tax exemptions, the use of school tax revenues, and conflicts of interest in school funding.

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52. *Id.* at 1582.
53. N.D. Const. art. 8, § 2.
54. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D. 1987).
55. N.D. Cent. Code § 15-34.2-06.1.

Whether a school tax base could be used for noneducational purposes was at issue in a 1987 Texas case. The Tax Increment Financing Act of 1981[56] and a constitutional amendment[57] require towns and cities in blighted or underdeveloped areas to define "reinvestment" zones where ad valorem taxes can be increased. Revenues so generated must be used to purchase property, improve approved property, or retire revenue bonds issued to fund approved projects. The city of El Paso created a tax increment district in the central business districts. School districts within the zone claimed the Act was unconstitutional as applied to them. The city sought declaratory judgment that the Tax Increment Financing Act was constitutional. The trial court stated that school districts are political subdivisions and the Act was constitutional. The school districts appealed, contending that the ordinance was unconstitutional in allowing the city to use school district ad valorem tax revenues for noneducational purposes. They also argued that they were not political subdivisions within the meaning of the constitutional amendment. The appellate court reversed the lower court decision, holding that article VII of the Texas Constitution allows the use of school funds only for schools and that school districts were not subject to the mandate of the Tax Increment Financing Act. The city of El Paso appealed. The Supreme Court of Texas reversed and remanded the decision of the court of appeals.[58] The court examined the intent of the legislators and voters who adopted the amendment via records of floor debates in the Texas Senate. Those records revealed that legislators were aware of the potential impact of the Act on school districts. The Supreme Court thus held that school districts are political subdivisions and the Act was constitutional.

Tax Elections

A special school district mill levy election in the Drayton Public School District in North Dakota was challenged as illegal, erroneous, and the subject of fraudulent voting practices by a resident.[59] On the fourteenth day after final canvassing in which the levy was declared passed, the clerk of the school district, rather than the school board members, was served with a summons and an election contest complaint. Board members were served the following day, which was one day past the fourteen-day period provided for by statute. School board members moved to dismiss the contest on the grounds of insufficiency

56. Tex. Rev. Civ. Stat. Ann. art. 1066e.
57. Tex. Const. art. 8, § 1-g(b).
58. City of El Paso v. El Paso College Dist., 729 S.W.2d 296 (Tex. 1987).
59. Elliot v. Drayton Pub. School Dist., 406 N.W.2d 655 (N.D. 1987).

of process and the statute of limitations. A district court dismissed the action, denying the motion for relief by the contestants, who then appealed. The state supreme court held that the school board was the proper contestee; service of process on the clerk was not service upon the board; and statutory limitations were not inapplicable as a matter of law. However, the facts of the case indicated that there was a bona fide intent to serve the papers as soon as reasonably possible. Hence, the case should not have been dismissed as untimely. It was remanded to the lower court.

Tax Revenue Disbursement

In Missouri, school districts sought to compel the county collector of revenue to disburse real property taxes which had been collected, though under protest by taxpayers. A circuit court approved settlements which disbursed the funds under a constraining agreement. The agreement was that the collector could, using future revenues due, withhold the amount of funds which were determined to be owed contesting taxpayers. The four taxpayers, seeking to recover portions of real property taxes paid under protest, attempted to intervene. The St. Louis County Circuit Court denied their motions to intervene, and the taxpayers appealed. The taxpayers alleged they should have been allowed to intervene and denial of this action deprived them of due process. The court of appeals found no merit in their claims, and affirmed the four judgments of the circuit court.[60]

Bond Issuance

Cases concerning the process of raising revenues through bond referenda were adjudicated in Florida, Indiana, and Pennsylvania. Following the adoption of a bond issue resolution for capital improvements which the Florida Department of Education approved, the Palm Beach County School Board adopted a resolution containing planned improvements, a financing plan, and a call for the bond referendum. The majority of electors voted for the bond issue, the supervisor of elections certified the returns, and the school board passed a resolution authorizing it. Subsequently, the court issued a show cause order to which one resident responded. The resident charged that the board had over $220 million in investments and that some proposed improvements already had been completed. The resident charged that these facts negated the need for the bond issue and that had electors known these facts the

60. Maplewood-Richmond Heights School Dist. v. Leachman, 735 S.W.2d 32 (Mo. Ct. App. 1987).

referendum would have failed. A circuit court found no merit in the charges and validated the bond issue. The resident appealed and claimed that the court erred in striking his affirmative defenses; that the board did not publish proper resolutions and had insufficient evidence for certification of the election; and that the state attorney did not contest the bond validation properly. The Florida Supreme Court affirmed the lower court decision.[61]

In Indiana, a taxpayer sought to enjoin the Franklin County School Board's sale of first mortgage bonds to finance construction of a new high school. The complaint questioned the legality, feasibility, and cost of the construction project. The trial court dismissed the case, enjoining the taxpayer and other members of the Franklin County Taxpayers' Association from filing further suits intended to delay construction and financing. The taxpayer appealed, and the state supreme court upheld the lower court ruling.[62]

Pennsylvania taxpayers complained to the department of community affairs that a bond issue was invalid because the school district had not gained the consent of the electorate to increase its bonded indebtedness in excess of the 5% allowed by the Public School Statute of 1949.[63] The school district did not dispute this. Rather, it argued that nonelectoral borrowing limits were controlled by an amended section of the Local Government Debt Act.[64] This section provided that the aggregate net principal amount of new nonelectoral debt and outstanding debt not exceed 250% of the district's borrowing base. Borrowing base was defined as the annual arithmetic average of the total revenues received by the government unit during the last three full fiscal years preceding the date of incurring the new nonelectoral debt. The department of community affairs rejected the taxpayers' petition, whereupon they appealed. A commonwealth court agreed that the provisions for debt had been repealed by the Debt Act, and affirmed the orders of the department of community affairs.[65]

Delinquent School Taxes

Three cases pertaining to delinquent school taxes were heard in Pennsylvania and Texas. Moon Area School District in Pennsylvania sought to collect parking taxes, interest, penalty charges, and liquidated damages in the amount of $5.6 million from the operator of a county

61. Lodwick v. School Dist. of Palm Beach County, 506 So. 2d 407 (Fla. 1987).
62. Huber v. Franklin County School Bd. of Trustees, 507 N.E.2d 233 (Ind. 1987).
63. Educ. 24 Pa. Stat. Ann. § 6-632.
64. Local Gov't 53 Pa. Stat. Ann. § 6780-52.
65. Mellinger v. Department of Community Affairs, 533 A.2d 1119 (Pa. Commw. Ct. 1987).

parking lot located at the airport. Earlier, the district had passed a tax resolution which levied a 15% tax on the fee paid by users of nonresidential parking lots within the school district. Lot operators were required to collect the tax from patrons, retain 2% for compensation, file monthly tax returns, and pay the school district. Penalties for failure to collect the tax and pay the district were prescribed in the resolution. The airport lot operator had not paid the district since 1979. A common pleas court barred the district from seeking to collect the tax from the operator and denied its petition for funds held in escrow by the operator. The court held that the tax was constitutionally infirm. Moon Area School District appealed, and a commonwealth court reversed and remanded the case for an accounting of the tax monies owed the district.[66]

Also in Pennsylvania, a school district brought action against a resident for failing to remit his per capita tax. The taxpayer alleged he could not be indebted for a tax liability because taxes are not debts; he had not refused to pay the tax; and, the legal definition of "dollar" had not been provided to him. A common pleas court granted the school district a summary judgment, and the taxpayer appealed. The lower court ruling was affirmed and the case was remanded for a determination of damages and attorney's fees due to the school district.[67]

In Texas, Freer Independent School District brought suit to collect delinquent ad valorem taxes. The trial court found for the district, rendering judgment for the amount of taxes due and awarding costs, attorney's fees, interest, and foreclosing tax liens against the taxpayer's property. The decision was appealed. The state court of appeals remanded the case to the trial court for clarification of the judgment and "itemization of delinquent taxes due" on each parcel of land for which the court judgment was affirmed. The trial court ordered that the delinquent taxes be itemized, but instructed the parties to use only information contained in the original trial record to do so. The case was subsequently remanded to the trial court again with instructions to receive all necessary evidence to enable the court to determine and incorporate a legally sufficient description of each parcel of property upon which the plaintiff owed taxes.[68]

School Tax Exemptions

Cases concerning school tax exemptions were litigated in Pennsylvania and New York. In Pennsylvania, G.D.L. Plaza Corporation, a nonprofit firm, entered suit against the Council Rock School District,

66. Moon Area School Dist. v. Gargony, 529 A.2d 540 (Pa. Commw. Ct. 1987).
67. Cupelli v. School Dist. of Allentown, 514 A.2d 962 (Pa. Commw. Ct. 1987).
68. Manges v. Freer Indep. School Dist., 728 S.W.2d 842 (Tex. Ct. App. 1987).

seeking exemption from a residential construction tax on an apartment complex for the elderly and handicapped. Plaza claimed it was a public charity and that the state constitution permitted exemption for such public charities. Council Rock School District argued that the apartment complex did not qualify as a public charity. A common pleas court determined that the services provided by Plaza did constitute a public charity since it provided "low cost housing for elderly persons with limited incomes." The court granted an exemption for G.D.L. Plaza, and the school district appealed. A commonwealth court applied five criteria for establishing a purely public charity to the facts in this case.[69] The five criteria were (1) advances a charitable purpose, (2) donates or renders gratuitously a substantial portion of its services, (3) benefits a substantial and indefinite class of persons who are legitimate objects of charity, (4) relieves the government of some of its burdens, and (5) operates entirely free from profit motive. The court concluded that the evidence on criteria two and four did not support Plaza's contention that it was a public charity. The judgment of the common pleas court was reversed, and G.D.L. Plaza Corporation appealed.

The Supreme Court of Pennsylvania found that Plaza had a charitable purpose, but was not founded, endowed, and maintained by a public charity.[70] Rather, all funding was derived from the federal government. Thus, it did not relieve the government of its burdens. The court affirmed the finding of the commonwealth court, noting that neither the corporation nor the beneficiaries of the housing service would be adversely affected by subjecting this property to payment of real estate taxes.

In New York, a taxpayer sought partial exemption from school taxes under the real property tax law from the town board of assessors. In 1979, the school district passed a resolution purporting to eliminate the percentage of tax exemption provided by law. The taxpayer entered a motion for partial summary judgment to the Supreme Court of Suffolk County. The court denied the motion, and the taxpayer appealed. The appellate court held that the taxpayer was entitled to a partial exemption under the real property tax law since there was no indication that the property in question did not come within its provisions.[71] The court observed that each school district computes, ascertains, and adopts the tax rate needed to generate required funds for the budget, but only the legislature causes warrants for the collection of taxes to be annexed to the assessment roll. Thus, school districts lack the power to levy taxes or

69. *See* The Yearbook of School Law 1987 at 231.
70. G.D.L. Plaza v. Council Rock School Dist., 526 A.2d 1173 (Pa. 1987).
71. 510 Joint Venture v. Board of Assessors, 514 N.Y.S.2d 436 (App. Div. 1987).

to reduce the school tax exemption provided for in the real property tax law. The court reversed the trial court decision, granted the motion for partial summary judgment, and directed the Board of Assessors of the Town of Huntington to refund any excess real property school taxes paid by the taxpayer.

In other New York litigation, the Lafayette Central School District sought to determine that the Niagra Mohawk Power Corporation was not entitled to a property tax exemption. The district alleged that an exemption had been improperly granted and that additional taxes plus interest were due. The trial court entered summary judgment for the school district, and the power company appealed. The appellate court modified and affirmed as modified, stating that interest on additional taxes was not owed.[72] The court held that only interest on late payments and delinquencies where the taxes were actually levied were appropriate. In this case, the additional taxes were the result of a court order eliminating the exemption.

Uses of Revenue

Five cases pertaining to employment contracts and one pertaining to an equipment lease were litigated. In Alabama, school employees sued a school board for breach of contract when the board refused to pay $100 bonuses promised for perfect attendance. This incentive policy, adopted at the first board meeting in October 1983, was amended at the second board meeting in October by reducing the bonus payment to $20 for each unused sick leave day up to a maximum of nine days. Both plans were to be retroactive to the beginning of the school year.

In March 1984, the board's attorney suggested that the incentive award might be unconstitutional. Several employees filed notice requesting pay for unused sick days. They were informed of the attorney's opinion and told that the board was considering an alternative incentive plan. The employees filed suit, and the trial court granted summary judgment for the board. On appeal, the employees alleged that the policy became enforceable when the school board adopted and published notice of it. The board contended the policy was unconstitutional under article IV of the Alabama Constitution, which prohibited extra compensation for public employees after services have been rendered or a contract made. Furthermore, they argued that payment at the end of the year was tantamount to payment after services had been rendered. The Alabama Supreme Court held that there was no prohibition against granting additional compensation in exchange for additional

72. Lafayette Cent. School Dist. v. Niagara Mohawk Power, 514 N.Y.S.2d 297 (App. Div. 1987).

consideration given by an employee.[73] Because the school employees were legally entitled to the use of their sick leave days, they had, in effect, entered into a contract for additional compensation to be paid by the board. The lower court decision was reversed and remanded.

In another Alabama case, a statute providing a 15% cost-of-living raise to teachers and full-time support personnel who worked in kindergarten through twelfth grade or with children five years of age or older was contested.[74] Several personnel who did not receive the raise sought declaratory relief and preliminary injunctions against the board. The court of civil appeals found the employees ineligible for the cost of living raise by virtue of their work assignments.[75] The employees did not work with the categories of pupils specified in the statute.

In West Virginia, voters authorized a special levy to increase the annual salaries of nonteaching personnel over a period of five years. The legislature amended the West Virginia Code to increase the minimum salary levels for such personnel prior to the approval of the special levy. A county superintendent of schools requested an interpretation of the amendments adopted by the legislature. By memorandum, the state superintendent suggested that the special levy funds were to be used to meet the amended minimum pay scales, not to supplement the minimum pay. The county superintendent proceeded to so use the special levy funds. School service personnel in the county sought declaratory judgment to construe the employment contracts and to recover funds and accrued interest alleged due as salary supplements. The county board of education filed for dismissal on the basis of the statute of limitations and was denied. Subsequently, they filed both an answer denying liability and a third-party complaint, alleging that salaries were reduced by the state board of education and other state officials. A complicated set of motions to dismiss followed which eventuated in the West Virginia Supreme Court's decision that the county board of education was not immune from contractual liability because it followed directives from the state superintendent; however, the declaratory judgment against the county board of education was barred by laches.[76] The case was remanded to the trial court which was instructed to enter an order in favor of the county board.

In Washington, the Kelso Education Association and teachers filed suit against the school district, seeking declaratory judgment and a writ of mandamus concerning the use of supplemental contracts for regular teaching assignments. Each teacher held a contract which was in part

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73. Kohen v. Board of School Comm'rs, 510 S.E.2d 216 (Ala. 1987).
74. Ala. Code § 16-8-41.
75. Hill v. Greene County Board of Educ., 510 So. 2d 264 (Ala. Ct. App. 1987).
76. Maynard v. Board of Educ. of Wayne County, 357 S.E.2d 247 (W. Va. 1987).

under a continuing contract and in part under a supplemental contract. The teachers, at different times, filed grievances requesting fulltime contracts and argued that district practices violated the continuing contract statute. The district entered a cross-motion for summary judgment. The trial court denied plaintiff's motion, and the teachers appealed. The Washington Court of Appeals reversed the lower court's decision, holding that the school district "may not avoid the protections under the continuing contract statute by issue of supplemental contracts for contracts issued for the basic school year."[77] By statute, supplemental contracts are authorized, but the type of duties covered are not specified. Using case law, the court determined that continuing and supplemental contracts differed on the basis of curricular or extracurricular duty assignments, days worked in addition to the basic school year, and the intent of protection in the continuing contract statute. The facts of the cases indicated that the duties specified in the teachers' supplemental contracts were for teaching classes in the regular curriculum. On remand, the court ordered that the teachers' contracts be amended to continuing contracts.

In a Texas case, the assignee for an energy management equipment company, a bank, brought action against a school district to recover money pertaining to an equipment lease. The lease was for a period of four years and eleven months. After one year, the school district stopped making monthly payments, and the bank sued. Both the bank and the school district moved for summary judgment. The trial court entered a summary judgment for the bank for ten payments due in the current year. The school district appealed, and the bank responded seeking full recovery on the balance of the lease. The appellate court observed that the Texas Education Code prohibits a school district from entering into a contract that will cause a deficiency debt against the district.[78] To recover a claim, the plaintiff must prove that funds were legally available at the time the contract was made. The Bank of Dallas did not do this, and the appellate court was unable to discover evidence that funds were appropriated for the ten-month period for which the lower court rendered judgment. The judgment of the trial court was reversed and the case remanded for further proceedings.

Conflict of Interest in School Funding

In a complex case in Mississippi, the attorney general and the ethics

77. Kelso Educ. Ass'n v. Kelso School Dist. No. 453, 740 P.2d 889, 891 (Wash. Ct. App. 1987).

78. Crystal City Indep. School Dist. v. Bank of Dallas, 727 S.W.2d 762 (Tex. Ct. App. 1987).

commission sought declaratory judgments for violations of constitutional prohibitions of conflict of interest against eight people. Three legislators who also were employed by universities, a member of the county board of supervisors who was a bank officer, a city alderman who was an elementary school principal, a legislator whose wife was employed as a teacher, another member of the county board of supervisors who was a teacher, and a legislator who was president of an insurance corporation were defendants. The trial court granted declaratory relief and denied restitution. The defendants appealed and the ethics commission cross-appealed. The Mississippi Supreme Court held that the constitutional prohibition had been violated by (1) legislators who voted for appropriation bills that funded their contracts with public schools and state universities, (2) teachers whose salaries came from discretionary local tax levies that they had voted for as a member of the governing authority making such levies, and (3) the county board member who voted for depository contracts with the bank in which he was an officer and shareholder.[79] The court did not find a conflict of interest for the legislator whose wife held a teaching contract nor for the teacher who was a county board member voting for mandated tax levies. The trial court's denial of restitution was affirmed.

79. Frazier v. State, 504 So. 2d 675 (Miss. 1987).

8

HIGHER EDUCATION

Robert M. Hendrickson*

Introduction / 223
Intergovernmental Relations / 224
Employees / 228
- Discrimination in Employment / 228
  - Title VI / 228
  - Title VII / 230
  - The Equal Pay Act / 233
  - Title IX / 234
  - Age Discrimination / 234
  - Rehabilitation Act / 235
  - Hiring Discrimination / 235
- Nontenured Faculty / 236
  - First Amendment Freedom of Speech / 236
  - Nonrenewal Procedures / 237
  - Part-time Faculty / 239
- Tenured Faculty / 239
  - Termination for Cause / 239
  - Termination for Financial Exigency / 241
- Collective Bargaining / 242
- Administration and Staff / 243
- Denial of Employee Privilege / 245
- Denial of Employee Benefits / 246

Students / 248
- Admissions / 248
- Financial Aid / 250
- First Amendment / 253
  - Freedom of Religion / 253
  - Freedom of Speech / 253
  - Freedom of Expression / 255
- Dismissal / 255
  - Disciplinary Dismissal / 255
  - Academic Dismissal / 256
- Other Constitutional Privileges / 259

Liability / 260

Personal Injury / 260
Workers' Compensation / 261
Contracts / 262
Educational Malpractice / 263
Medical Malpractice / 263
Negligence / 264
Indemnification / 265
Antitrust / 265
Patent and Trade Mark / 266

*Carol A. Yoannone, a doctoral student and graduate assistant in the Higher Education Program, assisted in the preparation of this chapter.

INTRODUCTION

Litigation in 1987 was very brisk with an increase in the number of higher education cases reviewed. A number of issues were somewhat unique this year. A state's action of closing down an institution continued to result in litigation. Legislative authority, sunshine laws, and questions of ownership of scholarly papers were some of the more interesting cases in the area of intergovernmental relations.

In employment, the case law continued to be substantial. Cases of particular interest included the setting aside on jurisdictional issues of a court order requiring southern and border states to bring their higher education systems into compliance with title VI of the Civil Rights Act of 1964. A class of female faculty were decertified because of the decentralized structure and employment decision making at a university. Multiple regression cases under title VII and the Equal Pay Act continued to be litigated. There were also numerous cases in the areas of tenure awards and termination of tenured faculty for cause.

The student litigation cases were varied. Loan and scholarship defaults continued to be the bulk of cases in the financial aid area. Cases involved first amendment questions in the location of shanties in apartheid demonstrations at several institutions. Another case involved the student government's denial of student funds to a homosexual group.

The number of liability cases was also voluminous. Cases such as alcohol consumption resulting in death and fraternities serving alcohol

to minors were before the courts. A Colorado case removed liability from the institution emanating from a trampoline accident on the front lawn of a fraternity.

INTERGOVERNMENTAL RELATIONS

Litigation continued around the decision of the South Dakota Legislature to close a state college.[1] In one of the latest cases, students claimed that their contract and constitutional rights were violated in the closing of the state institution.[2] The court found that contract obligations only existed on an academic term basis; thus, no contract existed or was breached when the institution was closed. Furthermore, the court found that the students had no enforceable claims against the regents. In a related case, the court ruled that attorney's fees could not be awarded in a claim which challenged the constitutionality of the legislation converting the college to a prison.[3] In yet another case, the court ruled the warranty of the deed, transferring the land the college was located on from a private citizen to the state, contained no provisions restricting the use of the land for educational purposes.[4]

In Alabama, the court was asked to review the constitutionality of an appropriations bill for elementary and secondary schools, technical schools, colleges, and universities as well as nonstate agencies.[5] The court found that the bill fit under the provisions of a "single subject" appropriations bill (funding public education), but the funding of nonstate agencies should not be included. In another case involving legislative appropriations, a governor's veto of a portion of a bill was limited to an emergency clause, not to other provisions in the bill.[6]

The authority of the board over various activities and its powers as a governmental agency were before the court in several states. A Wyoming case involved the issue of the state community college commission's denial of a county's petition to establish a community college district.[7] The court found that the commission had not acted in an arbitrary or capricious way even though the production of evidence was inadequate under several of the areas the commission was obligated to consider under the law. The court noted that caution needs to be observed in not leaving the realm of jurisdiction of the court and becoming embroiled in

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1. See The Yearbook of School Law 1986 at 229, Kanaly v. State, 368 N.W.2d 819 (S.D. 1985); Merkwan v. State, 375 N.W.2d 624 (S.D. 1985).
2. AASE v. State, 400 N.W.2d 269 (S.D. 1987).
3. Kanaly v. State, 401 N.W.2d 551 (S.D. 1987).
4. Kanaly v. State, 403 N.W.2d 33 (S.D. 1987).
5. Opinion of Justices, 512 So. 2d 72 (Ala. 1987).
6. Libscomb v. State Bd. of Higher Educ., 736 P.2d 571 (Or. Ct. App. 1987).
7. *In re* Campbell County, 731 P.2d 1174 (Wyo. 1987).

the decision-making responsibilities of an administrative agency. In a Texas case, the state approved a constitutional amendment which allowed a city to declare a blighted area a "reinvestment zone" where bonds could be sold to finance improvements and ad valorem tax revenues from the zone designated under other state statutes for educational purposes would be used to pay for improvements. The court remanded the case for consideration of the conflict between the two amendments in the use of tax funds.[8]

In Arizona, the court ruled that the state constitution provides that employees of the state university system are under the authority of the board of regents and exempt from the state civil service system.[9] In another case, local hotel and taxi cab owners challenged the state university's practice of housing groups in residence halls during a Shakespearean Festival.[10] The owners alleged that the practice was outside the statute requiring the state board of higher education to use its facilities for "higher education" since those housed were not matriculated students. The court found that the authority to interpret the meaning of the phrase "higher education" was within the board's discretion. In a related case, the court found that the board had authority under the bonding statute to raise dormitory rent and to use revenue for a maintenance facility.[11] Public notice of the board meeting met any due process requirements alleged by the plaintiff, a student rentor. The role of the board members in conflict of interest situations was before a West Virginia court.[12] The court found that a conflict of interest existed and the attorney, as a public trustee, could not represent a claimant in a claim against the institution or its employees.

Litigation involving agencies which regulate academic standards, licensure, award of funds, or environmental or safety issues within higher education institutions was also before the courts. For example, the court upheld the authority of the education department to refuse to award a license to practice psychology in the state to the holder of a doctoral degree in counseling and student personnel instead of the requisite psychology degree.[13] In another case, the National Coal Association, whose members produce most of the nation's coal, charged that the Secretary of the Interior of the United States failed to act in the public interest when he allowed the exchange of private land within Grand Teton National Park for federal land in another area of Wyom-

8. City of El Paso v. El Paso Community College, 729 S.W.2d 296 (Tex. 1987).
9. Arizona Bd. of Regents v. State, 728 P.2d 669 (Ariz. Ct. App. 1986).
10. Jansen v. Atiyeh, 743 P.2d 765 (Or. Ct. App. 1987).
11. Reese v. Board of Regents of Utah, 745 P.2d 457 (Utah 1987).
12. Graf v. Frame, 352 S.E.2d 31 (W. Va. 1986).
13. Karasik v. Board of Regents, 516 N.Y.S.2d 331 (App. Div. 1987).

ing.[14] Princeton University had received the land in the national park as a bequest. By trading the parcels of land the federal government acquired the land within the national park, and Princeton was able to sell the other land to a coal mining company. The court refused to "second guess" the secretary's discretionary decision. A Florida case involved the authority of the State Board of Independent Colleges to restrict the use of the word "college" in the name of a consulting firm.[15] The court ruled that a consulting firm, which offered classes and seminars but did not offer degrees, could not be restricted by the board in its selection of a name.

Several cases involved the payment of public funds to a university operated hospital for services rendered under welfare[16] or medicare.[17] Finally, a university had not sought adequate administrative remedies in its appeal of the denial by the state health agency to grant it a permit to acquire and operate a nuclear magnetic scanner at its teaching hospital.[18]

Sunshine laws and access to university records and meetings were litigated again this year. In a Colorado case, a newspaper wanted access to documents related to a university project to establish a medical school in a foreign country.[19] The court balanced the right of privacy of an individual's personnel file against the need of public access to information under the law. The court found in this case, where salaries are coming from a foreign power, that the public needs access to personnel documents. However, the court denied the newspaper an award of attorney's fees because the university had not acted in an arbitrary and capricious way when it refused to release the documents. In a Mississippi case, the court vacated a decision in one county and remanded the case to the county wherein the plaintiff and the university resided.[20]

In a Kentucky case, the court ruled that the presidential search committee appointed by the university board was required to hold meetings open to the public.[21] The court reasoned that provisions in the law only exempted discussions of an individual's personnel matters, not general personnel matters.[22] In North Carolina, the court ruled the case

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14. National Coal Ass'n v. Hodel, 825 F.2d 523 (D.C. Cir. 1987).
15. Philip Crosby Assoc. v. State Bd. of Indep. Colleges, 506 So. 2d 490 (Fla. Dist. Ct. App. 1987).
16. Temple Univ. v. Commonwealth Dep't of Pub. Welfare, 521 A.2d 986 (Pa. Commw. Ct. 1987).
17. University of Cincinnati v. Secretary of Health and Human Servs., 809 F.2d 307 (6th Cir. 1987).
18. George Washington Univ. Medical Center v. District of Columbia Bd. of Appeals and Review, 530 A.2d 227 (D.C. 1987).
19. Denver Post Corp. v. University of Colo., 739 P.2d 874 (Colo. Ct. App. 1987).
20. Board of Trustees of State Institutions of Higher Learning v. Van Slyke, 510 So. 2d 490 (Miss. 1987).
21. Lexington Herald-Leader Co. v. University of Ky., 732 S.W.2d 884 (Ky. 1987).
22. *Id.* at 886.

moot since the report in question had subsequently been released with a final report from the board.[23] In a California case, students sued to obtain access to law school faculty meetings under the state's public meeting law.[24] The court ruled that bodies appointed to advise the board, or that have authority delegated to them by the regents, were not subject to the open meeting laws.

A number of cases concerned whether local taxes should be applied to various functions of colleges or universities. In an Illinois case, the city assessed property tax against a privately owned apartment building leased to the college for use as a dormitory.[25] The court found that the property being held for the benefit of the grantors of the lease, as opposed to the college, was subject to property tax, and that the college was obligated to pay the taxes under the lease agreement. A West Virginia community assessed an amusement tax on revenues from a public university's athletic contests and concerts.[26] The court ruled that revenues from events deposited in a public fund which did not result in private profit were not taxable under the provisions of a city amusement tax. A Washington case involved the validity of a 1906 condemnation order which gave control to the university of a street through university property, but also required the university to pay street use fees.[27] The property bequeathed to the university in 1861 was located in downtown Seattle. The court ruled that equitable estoppel bars the state from attempting to void the condemnation order. Furthermore, the city's ordinance requiring the removal of a pedestrian skybridge at the institution's expense and the payment of permit fees was enforceable.

Zoning laws and rulings of zoning boards were also before the courts. In a Massachusetts case, the court ruled that the licensing board had exceeded its authority when it denied the university an apartment license for a facility in a residential neighborhood because of its affect on the neighborhood.[28] In a New York case, the court ruled that the zoning board exceeded its authority when it required the institution to justify the need for the expansion [29] Elaborating further, the court noted that this does not preclude the board from placing restrictions to mitigate delitorious effects the project might have on the neighborhood.[30] A

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23. North Carolina Press Ass'n v. Spangler, 360 S.E.2d 138 (N.C. Ct, App. 1987).
24. Tafoya v. Hastings College of Law, 236 Cal. Rptr. 395 (Ct. App. 1987).
25. Wheaton College v. Department of Revenue, 508 N.E.2d 1136 (Ill. App. Ct. 1987).
26. City of Morgantown v. West Virginia Bd. of Regents, 354 S.E.2d 616 (W. Va. 1987).
27. Washington Univ. Bd. of Regents v. Seattle, 741 P.2d 11 (Wash. 1987).
28. Trustees of Boston Univ. v. Licensing Bd. of Boston, 510 N.E.2d 283 (Mass. App. Ct. 1987).
29. Cornell Univ. v. Bagnardi, 510 N.Y.S.2d 861 (N.Y. 1986).
30. *Id.* at 868.

California court challenged the approval of the university's environmental impact statement issued for the construction of a biomedical research facility in a neighborhood.[31] Since the project involved the release of toxic chemicals and the use of radioactive materials and carcinogens in a densely populated area, the court found the impact statement to be inadequate.

Several cases involved jurisdictional questions or questions of ownership. A Maryland university brought suit against a Rhode Island university over a contract dispute concerning a research contract.[32] A Maryland court granted a default judgment against the Rhode Island university. The Rhode Island court ordered the enforcement of the Maryland court default judgment finding that the Rhode Island university did sufficient business in the state of Maryland to apply the state's long arm statute and give the court jurisdiction. In an Illinois case, the court ruled that the jurisdiction of campus police is not limited to the campus proper and upheld the issuance of a drunk driving citation by campus police a mile off campus.[33]

In a case involving ownership, the widow and daughter of an author bequeathed his manuscripts and correspondence to Yale University. The writings were being held as part of the collection of Fisk University, which claimed ownership. The federal district court found that Fisk University, by its practices, had acknowledged it lacked ownership of the collection and that there was no record that a gift had been made to Fisk.[34] The collection was ordered transferred to Yale University.

Finally, two cases involved university affiliated hospitals. In a New Mexico case, the court found that the wrongful death act prohibited an attempt by the university to attach a lien to a wrongful death award.[35] In a New York case, the court found that a patient does not possess a constitutional right to highly technical hospital equipment, which would require the hospital to give the patient's doctor access to the equipment when that doctor is not affiliated with the hospital.[36]

EMPLOYEES

Discrimination in Employment

Title VI. A number of cases involve the use of federal funds or state funds in state systems which have perpetuated a historical tradition of

31. Laurel Heights Improvement Ass'n v. University of Cal., 238 Cal. Rptr. 451 (Ct. App. 1987).
32. Maryland Cent. Collection Unit v. University of R.I., 529 A.2d 144 (R.I. 1987).
33. People v. Smith, 514 N.E.2d 1158 (Ill. App. Ct. 1987).
34. Yale Univ. v. Fisk Univ., 660 F. Supp. 16 (M.D. Tenn. 1985), *aff'd*, 810 F.2d 204 (6th Cir. 1987).
35. Hall v. Regents of the Univ. of N.M., 740 P.2d 1151 (N.M. 1987).
36. Brindisi v. University Hosp., 516 N.Y.S.2d 745 (App. Div. 1987).

discrimination. The most notorious case emanates out of the *Adams* case.[37] In this case, under a court order, the United States Department of Health, Education, and Welfare was to enforce the provisions of title VI[38] by requiring a number of southern and border state educational systems to develop plans to comply with the statute under pain of loss of federal funds. Since that time the court order has been the focus of a number of litigations and court maneuvering. The most recent ruling challenges the court's jurisdiction to issue the original court order.[39] This case emanated from another case remanded for a hearing on the question of standing.[40] The federal district court of the District of Columbia found limited jurisdiction in a case involving a federal agency because of the concepts of separation of powers under article II of the United States Constitution from which the doctrine of standing emanates. Under the standing doctrine, the court found that there was a justiciable injury, the right to be educated in a racially integrated institution. However, the conduct of a third party was not involved in this litigation (i.e., public institutions and programs which are not federal agencies, possess the nexus between injury and causation). The plaintiffs failed to show a nexus between the provision of federal funds and the alleged discrimination. The court held that the court orders under review violated the concepts of separation of powers between the executive and judicial branches of government that the plaintiffs and interveners lacked standing to continue this litigation.

In a related case, the United States and interveners[41] sued the state system of higher education alleging the perpetuation of a discriminatory dual system of higher education in violation of title VI. The district court found that the dual system existed and ordered the state to submit a plan to the court which would eliminate all vestiges of this dual system.[42] On appeal, the circuit court found that the district court judge should have disqualified himself, because as a state politician he was deeply involved in determining the make up of the state board and the formulation of this case.[43] More importantly, citing *Grove City College v. Bell*,[44] the court found that a claim could not be maintained against the entire

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37. Adams v. Richardson, 351 F. Supp. 641 (D.D.C. 1972), *modified*, 356 F. Supp. 92 (D.D.C. 1973), *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973).

38. 42 U.S.C. § 2000d.

39. Adams v. Bennett, 675 F. Supp. 668 (D.D.C. 1987).

40. Women's Equity Action League v. Bell, 743 F.2d 42 (D.C. Cir. 1984).

41. *See* The Yearbook of School Law 1987 at 238, United States (Knight) v. Alabama, 791 F.2d 1450 (11th Cir. 1986). *cert. denied*, 107 S. Ct. 1287 (1987).

42. *See:* The Yearbook of School Law 1986 at 192, United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985).

43. United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987).

44. *See* The Yearbook of School Law 1985 at 313, Grove City College v. Bell, 465 U.S. 555 (1984).

state system of higher education because of the program specific nature of title VI. However, the court remanded the case for adjudication of the equal protection claims of the individuals known as the Knight Interveners.

An Arkansas case brought the issue of race discrimination in salaries and promotion in a university extension service before the court.[45] The court found that the disparate treatment of blacks was based on a valid employment criteria (poor job performance). However, the case was remanded requiring the state to show by a perponderence of the evidence that the employees would have been treated the same way if they were white. The court reasoned that past and current practices may have worked to disadvantage blacks.[46]

In a Tennessee case, an employee was barred from a discrimination suit under federal law.[47] State statutes made it clear that the university fell under the sovereign immunity provisions of the eleventh amendment. In a related case, the court set the statute of limitations at three years under New York Law in a section 1983[48] case involving an arrest and alleged beating by campus police.[49]

Title VII. Title VII requires that the plaintiff file a complaint within 300 days of the alleged discrimination. The concept used to determine whether this time limit was met or when the clock starts is called equitable tolling. In a tolling case, the Supreme Court denied *certiorari* in a case involving a white male who alleged discrimination in his termination as an instructor at a community college.[50] The Court found that the tolling period had lapsed and, under the circumstances, the reasonably prudent individual could have determined whether his dismissal was discriminatory.

Procedural issues were also before the court under title VII. In a Louisiana case, the Fifth Circuit ruled that the district court errored in dismissing a case because of counsel's tardiness in meeting pretrial deadlines when the plaintiff's counsel was ready for trial.[51] They found that such a ruling penalized the plaintiff who was innocent of any misconduct. In Texas, the court ordered a mistrial because of the ineffectiveness of the plaintiff's counsel.[52] A portion of the attorney's fees were awarded to a Michigan institution by a plaintiff and counsel

45. White v. University of Ark., 806 F.2d 790 (8th Cir. 1986).
46. *Id.* at 794.
47. Jain v. University of Tenn., 670 F. Supp. 1388 (W.D. Tenn. 1987).
48. 42 U.S.C. § 1983 (1983).
49. Okure v. Owens, 816 F.2d 45 (2d Cir. 1987).
50. Mauro v. Board of Higher Educ., 658 F. Supp. 322 (S.D.N.Y. 1986), *aff'd*, 819 F. 2d 1130 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 169 (1987).
51. John v. Louisiana, 828 F.2d 1129 (5th Cir. 1987).
52. Vance v. Texas A. & M. Univ. Sys., 117 F.R.D. 93 (S.D. Tex. 1987).

resulting from false testimony.[53] In a Virginia case, the court ruled that although the filing of a title VII case did not preclude the filing of a section 1981 claim, it was barred by the eleventh amendment.[54]

Title VII cases involving the shifting burden of proof and disparate impact were before the court. In several cases, the plaintiff failed to establish a *prima facia* case of discrimination. In one case involving a theology position at a Catholic university, the plaintiff failed to establish that sex was a factor in her failure to obtain the position.[55] The court touched on a religious institution's exemption from title VII, but decided there was no need to explore the exemption question in this case. In a North Carolina case, the circuit court affirmed the lower court finding that the plaintiff failed in her burden to establish a prima facia case for both sex and age discrimination.[56] The court found that while the plaintiff alleged that the county extension service discriminated against women in the employment of supervisors for the extension service, she failed to substantiate these allegations with statistical evidence.

In another case decided in the Seventh Circuit, the court ruled that the plaintiff failed to establish a prima facia case for discrimination when the institution failed to promote her.[57] The institution provided a valid nondiscriminatory reason (i.e., failure to meet published criteria used in salary enhancement). Finally, a white female failed to show she was treated any differently than black males similarly situated.[58]

In another shifting burden of proof case, the plaintiff failed to establish that the reasons given for a personnel decision were a pretext for discrimination. In a New York case, the female applicant for an associate dean's position failed to show that the institution's reason for not hiring her, the lack of appropriate qualifications, was a pretext for discrimination against women.[59] Two black electricians sued when they lost their jobs at a predominantly black institution because of financial exigency.[60] The Eighth Circuit Court reversed and remanded the case finding that the evidence indicated that they were removed because of their race. The court found the institution's reasons (undependable work records) were not supported by the evidence, and the institution's action of filling a subsequent vacancy with an inexperienced white person gave credence to the conclusion that race was a factor. A similar

53. Bynum v. Michigan State Univ., 117 F.R.D. 94 (W.D. Mich. 1987).
54. Wilson v. University of Va., 663 F. Supp. 1089 (W.D. Va. 1987).
55. Macquire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987).
56. Ballinger v. North Carolina Extension Serv., 815 F.2d 1001 (4th Cir. 1987).
57. Dugan v. Ball State Univ., 815 F.2d 1132 (7th Cir. 1987).
58. Martin-Trigona v. Board of Trustees of the Univ. of D.C., 668 F. Supp. 682 (D.D.C. 1987).
59. Crowman v. Manhattan Community College, 667 F. Supp. 130 (S.D.N.Y. 1987).
60. Legrand v. Trustees of the Univ. of Ark., 821 F.2d 478 (8th Cir. 1987).

outcome was reached in an Alabama case.[61]

Class action suits were also before the courts. In a ruling which plows new ground in the class certification area, a district court decertified a class of female faculty.[62] The court reasoned that the multiple regression analysis and other anecdotal evidence, which pointed to actions based on sex, was insufficient to establish discrimination against a class. The court found the evidence showed a decentralized decision-making process, which prevented plaintiffs from sustaining an argument that a pattern of discrimination against women could exist across the university.[63]

In another class action case, the institution's counsel continued unethical and inappropriate communications with members of a class of female athletes at the university.[64] The sanctions issued by the court included the distribution of notices at the institution's expense and the assessment of attorney's fees incurred in this litigation.

In a disparate impact class action case, the court found that the female plaintiffs had met their burden of establishing a *prima facie* case of discrimination.[65] In this multiple regression case, plaintiffs were able to establish sex as a factor in several years under analysis. While plaintiff's grouping of the departments into six groups was criticized, it was accepted by the court. The defendant's reasons for salary disparity, market forces, and service awards, did not account for the salary disparities over several years. The court found that the defendants had failed in their burden to establish other reasons for the disparity in salary.

In a disparate treatment case in which the institution's treatment of female faculty was compared with the treatment of males on employment decisions of rank, pay, promotion, tenure, and administrative appointments, the plaintiffs failed in their burden to show discriminatory intent.[66] The court noted that while historical evidence shows a record of past discrimination, the state has made attempts to rectify these discrepancies, and history alone would be insufficient to show intent.[67] Furthermore, the court's rejection of a multiple regression analysis, which either left out or inadequately measured decision making variables, did not place an unrealistic burden of proof on the plaintiffs. On the individual complaints, the judge found that each of the plaintiffs had established a *prima facie* case of discrimination, the institution had

61. Harrell v. University of Montevallo, 673 F. Supp. 430 (N.D. Ala. 1987).
62. Rosenberg v. University of Cincinnati, 654 F. Supp. 774 (S.D. Ohio 1986).
63. *Id.* at 778.
64. Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987).
65. Denny v. Westfield State College, 669 F. Supp. 1146 (D. Mass. 1987).
66. Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 158 (1987), *rehearing denied*, 108 S. Ct. 473 (1987).
67. *Id.* at 461.

provided valid reasons related to the specific job, and the plaintiffs each failed in their burden to show the institution's reasons to be pretextual.[68]

In a retaliation case, the plaintiff met his burden by showing that he engaged in a protected activity and was subjected to adverse employment activity by the employer, and that a causal link existed between the two.[69] A black personnel administrator had complained both publically and privately that race discrimination had existed in employment. Retaliation consisted of a limitation on activities and a demeaning monitoring procedure requiring permission from his superior to leave his work space.

The final case in this section involves both title VII and the Equal Pay Act. The court found that a Florida institution's refusal to allow a male employee to participate in a salary equity scheme was discriminatory.[70] The multiple regression analysis, used to identify females for salary equity adjustments, identified him as a candidate for adjustment even after a salary adjustment agreement had been entered into by the parties. The court noted that discrimination, which occurred after a salary equity agreement was put in place for the plaintiff, was justiciable and that the lower court errored in ignoring the salary inequity after the agreement was in force. The case was remanded.

The Equal Pay Act. The lead-off case in this section is one which has been before the courts for a number of years.[71] The case dealt with a class action suit involving multiple regression analysis which was found inadequate by the courts because crucial job factors were excluded. The circuit court remanded the case[72] based on the Supreme Court ruling in *Bazemore*.[73] On remand the district court upheld its previous decision. The court reasoned that under the test in *Bazemore*, the multiple regression failed to show discrimination based on sex.[74] Additionally, the rejection of evidence when the plaintiff switched from disparate treatment proof to disparate impact proof in the eleventh hour of litigation was based on evidentiary rules (i.e. plaintiff failed to prove that the evidence was new or that the delay in presentation was caused by the defendant).[75]

In an Illinois case, a female assistant professor assumed a position at a salary lower than the previous employee had received. The previous

68. *Id.* at 463.
69. Coleman v. Wayne State Univ., 664 F. Supp. 1082 (E.D. Mich. 1987).
70. Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987).
71. *See* The Yearbook of School Law 1984 at 284, 289, Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983).
72. Sobel v. Yeshiva Univ., 797 F.2d 1478 (2d Cir. 1986).
73. *See* The Yearbook of School Law 1987 at 240, Bazemore v. Friday, 106 S. Ct. 3000 (1986).
74. Sobel v. Yeshiva Univ., 656 F. Supp. 587 (S.D.N.Y. 1987).
75. *Id.* at 559.

employee was a male tenured faculty member from another department. The court found that the previous salary history of the tenured faculty member was a factor in the pay differential and not sex. In affirming the lower court decision the court noted that a financial crisis was not a valid factor available to the university as a defense for salary disparity between males and females.[76]

The Third Circuit ruled, in a case involving custodial services under contract with a college, that the procedural errors by the trial judge were harmless errors.[77] While the trial judge inexplicably ruled that the gender of the plaintiff and the preferred labor class were not relevant, the evidence contained gender information and the error was corrected when the charge was given to the jury.

Title IX. *Cannon*, a saga of cases which has been before the courts for a number of years,[78] saw the Supreme Court refusing to hear another appeal.[79] In rejecting another suit of Ms. Cannon's in a federal rules decision,[80] the court threatened the plaintiff and counsel with further sanctions if "this endless stream of redundant and meritless pleadings" is not discontinued.[81]

Age Discrimination. The E.E.O.C. brought action against an institution when it terminated the grievance procedures filed by an employee after the employee had filed charges with the E.E.O.C. for age discrimination in the denial of tenure.[82] The institution took its action on the basis of a collective bargaining agreement. The court, balancing the employer's contractual rights against the individual's employee rights, found that the institution's action constituted retaliation which cannot be made legal by a collective bargaining agreement.

In another case, the court found that the provisions of an employee retirement plan did not violate the Age Discrimination Act.[83] The provisions maintained that no employer contributions would be made to the retirement program after the employee reached a certain age. In a Minnesota case, the plaintiff was unable to establish a prima facia case of age discrimination in his removal from a position with the state coordi-

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76. Covington v. Southern Ill. Univ., 816 F.2d 317 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 146 (1987).

77. Brobst v. Columbus Servs. Int'l, 824 F.2d 271 (3d Cir. 1987).

78. *See* The Yearbook of School Law 1987 at 245 nn. 61-63.

79. Cannon v. Loyola Univ. of Chicago, 107 S. Ct. 880 (1987); *See* The Yearbook of School Law 1987 at 245, Cannon v. Loyola Univ. of Chicago, 784 F.2d 777 (7th Cir 1986).

80. Cannon v. Loyola Univ. of Chicago, 116 F.D.R. 244 (N.D. Ill. 1987).

81. *Id.* at 245.

82. EEOC v. Board of Governors of State Colleges and Univs., 665 F. Supp. 630 (N.D. Ill. 1987).

83. Bell v. Trustees of Purdue Univ., 658 F. Supp. 184 (N.D. ind. 1987).

nating board.[84] The state legislature had voted to remove funding for the position.

A Utah case was brought under state statutes[85] on age discrimination and involved the reversal of an administrative law judge's findings.[86] The institution had provided legitimate reasons for the demotion and eventual dismissal of the employee. The plaintiff could not prove that poor work habits and failure to follow orders was a pretext for discrimination. In a related case, the finding of age discrimination under state law qualified the individual for a damage award but not reinstatement under the circumstances of this case since he was not qualified to teach in the area where the vacancy existed.[87] In another case, the court ruled that an employee could not use federal statutes to expand a claim under a state's common law of tort.[88]

Rehabilitation Act. A case involving a student who was refused a degree because of a handicap has implications for employment.[89] The student was evaluated by a state board and admitted to an optometry school. In his third year, he failed to pass one of four clinical areas because his handicap prevented him from performing the manual skills for several procedures which resulted in danger to patients. The court found that he was not an otherwise qualified handicapped individual and the institution had not errored in refusing to waive the requirements. The court found that these clinical requirements were substantial or fundamental and could not be interpreted as a reasonable waiver.[90]

Hiring Discrimination. Several hiring discrimination cases dealt with the question of access to information used in the hiring decision. In a California case, the plaintiff alleged discrimination based on sex in the failure to hire her as a faculty member. The court, citing key cases on access to documents,[91] found that she could "probably" establish a *prima facie* case of discrimination and ordered access to the peer evaluation materials of the successful male applicant.[92] In another California case, the plaintiff in a defamation suit sought access to information

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84. Reddemann v. Minnesota Higher Educ. Coordinating Bd., 811 F.2d 1208 (8th Cir. 1987).

85. Utah Anti Discrimination Act U.C.A. 1953 §§ 34-53-1 (Supp. 1986).

86. University of Utah v. Industrial Comm'n, 736 P.2d 630 (Utah 1987).

87. State Univ. Agricultural and Technical College at Farmingdale v. State Div. of Human Rights, 520 N.Y.S.2d 814 (App. Div. 1987).

88. Leathem v. Research Found. of City Univ. of N.Y., 658 F. Supp. 651 (S.D.N.Y. 1987).

89. Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987).

90. *Id.* at 673.

91. *See* The Yearbook of School Law 1987 at 249, EEOC v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985); The Yearbook of School Law 1982 at 264, *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

92. Rubin v. Regents of the Univ. of Cal., 114 F.D.R. 1 (N.D. Cal. 1986).

presented at a faculty meeting in which a unanimous vote denied him an endowed chair.[93] The court found that privacy rights of the professor outweighed the candidate's rights to take a deposition in this case.

In a West Virginia case, the plaintiff was able to prove that the refusal to hire her as a county extension agent was based on sex. The state Civil Rights Commission ordered her hired and awarded back pay.[94] The court affirmed the award of back pay and awarded the plaintiff attorney's fees for both the action before the commission and this action. In a California case, the court found that the plaintiff failed to establish a *prima facie* case of discrimination based on national origin as a Filipino American.[95]

Nontenured Faculty

First Amendment Freedom of Speech. The lead-off case in this section has been in the courts for over a decade. A faculty member who was refused tenure sustained a charge that his first amendment rights had been violated, because denial was due to his political activity.[96] The court ordered reinstatement, but based on eleventh amendment immunity, denied the award of back pay. In subsequent litigation, the plaintiff sued for back pay.[97] This 1987 litigation involved a suit for back pay against the state system office instead of the specific institution which the court denied on the same grounds.[98]

In an Arizona case, a faculty member was denied tenure due to his ineffective teaching style.[99] He filed a grievance with a faculty committee. The faculty committee found that his academic freedom had been violated by the institution's denial of tenure. The plaintiff alleged that his free speech and academic freedom were violated because the institution was in disagreement with his chosen methods of teaching (i.e., not attending classes so his students would become more self-reliant). The court found no violation of first amendment rights in the president's decision to deny tenure.

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93. Kahn v. Superior Court (Davies), 233 Cal. Rptr. 662 (Ct. App. 1987).

94. Kerns v. Bucklew, 357 S.E.2d 750 (W. Va. 1987).

95. Ibarbia v. Regents of the Univ. of Cal., 234 Cal. Rptr. 167 (Ct. App. 1987), *vacated, reh'g*, 237 Cal. Rptr. 92 (Ct. App. 1987).

96. Skehan v. Board of Trustees of Bloomsburg State College, 358 F. Supp. 430 (M.D. Pa. 1973), *vacated*, 501 F.2d 31 (3d Cir. 1974), *vacated and rem'd*, 421 U.S. 983 (1975), *reh'g*, Skehan v. Board of Trustees Bloomsburg State College, 431 F. Supp. 1379 (M.D. Pa. 1977).

97. *See* The Yearbook of School Law 1983 at 304, Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142 (3d Cir. 1982), *cert. denied*, 459 U.S. 1048 (1982); *See* The Yearbook of School Law 1987 at 250, Skehan v. Bloomsburg State College, 503 A.2d 1000 (Pa. Commw. Ct. 1986).

98. Skehan v. State System of Higher Educ., 815 F.2d 244 (3d Cir. 1987).

99. Carley v. Arizona Bd. of Regents, 737 P.2d 1099 (Ariz. Ct. App. 1987).

In another case, a faculty member who challenged the administration of the college by the dean was denied tenure.[100] The plaintiff alleged violations of free speech and argued that he came under earlier tenure provisions which meant he already had tenure. The circuit court found material issues of fact, reversed the summary judgment, and remanded the case for adjudication. In a related case, the court affirmed a lower court decision.[101] The circuit court found that while the plaintiff was involved in protected speech, other valid reasons for nonrenewal exited.[102]

Nonrenewal Procedures. The Supreme Court ruled that national origin would be a valid classification under a section 1983 suit alleging discrimination.[103] The circuit court had reversed and remanded the district court's grant of a summary judgment to the university on the plaintiff's discrimination claim based on Arab ancestry in the plaintiff's denial of tenure.[104] The case awaits a decision by the district court.

In another case reported previously,[105] plaintiffs alleged that they had *de facto* tenure, because of the number of years of service put in under one year contracts, and that nonrenewal of their contracts required due process. On appeal, the circuit court ruled that Rutgers University was an autonomous organization, not an arm of the state, removing the possibility of an eleventh amendment immunity defense.[106] Qualified immunity could not be determined for individual officers until the district court decided whether *defacto* tenure or a property right existed thereby requiring due process prior to nonrenewal.

Several cases involve access to information used in the decision to deny tenure. In a New York case, a male brought action to compel discovery of promotion and tenure committee deliberations.[107] The court found, absent "extraordinary cause," that disclosure would not be compelled. In another case, the university filed a motion to prevent the disclosure of confidential evaluations of outside experts in three promotion and tenure files.[108] The case involved state civil rights agency's

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100. Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987).

101. *See* The Yearbook of School Law 1987 at 253, Hamer v. Brown, 641 F. Supp. 662 (W.D. Ark. 1986).

102. Hamer v. Brown, 831 F.2d 1398 (8th Cir. 1987).

103. St. Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987).

104. *See* The Yearbook of School Law 1987 at 247, Al-Khazraji v. St. Francis College, 784 F.2d 505 (3d Cir. 1986).

105. *See* The Yearbook of School Law 1987 at 249, Kovats v. Rutgers University, 633 F. Supp. 1469 (D.N.J. 1986).

106. Kovats v. Rutgers, The State Univ., 822 F.2d 1303 (3d Cir. 1987).

107. Desimone v. Skidmore College, 517 N.Y.S.2d 880 (Sup. Ct. 1987).

108. Dixon v. Rutgers. 521 A.2d 1315 (N.J. Super. Ct. App. Div. 1987).

findings of probable cause that sex discrimination was involved in the denial of tenure to a female while promotion and tenure was granted to two similarly situated males. The university's motion was denied and the court endorsed the administrative law judge's limitations on disclosure.

Cases involving tenure review and a subsequent decision to deny tenure were before the courts. In one case a state appeals court held that the hiring of another faculty member to fill the plaintiff's position prior to the completion of the plaintiff's grievance did not violate due process and that judicial proceedings should not be filed prior to completion of administrative remedies.[109]

A variety of cases alleged discrimination under title VII. The Fourth Circuit found that the plaintiff lacked the appropriate qualifications for tenure under the burden of proof standard of title VII. This finding would collaterally estop the plaintiff's claims under both the Equal Pay Act and the Age Discrimination Act since the proof in all three were similar.[110] In Arizona, the plaintiff failed to establish sex discrimination based on the fact that the faculty in the all female school of nursing were not granted the same percentage of release time for research as the faculty in the all male school of pharmacy.[111] In another case, the court found a number of allegations time barred and ruled that ample evidence existed to support the institution's denial of tenure based on poor performance across several criteria.[112] However, the First Circuit remanded a case involving denial of tenure because the court errored in applying the burden of proof and in ordering the plaintiff reinstated for two years with back pay.[113] The institution alleged that poor teaching was the reason for denial of tenure. The plaintiff alleged that the decision was effected by discrimination because the all male department made the original decision to deny tenure. The court found that the second step in the shifting burden of proof was for the institution to prove that absent discrimination, the same decision would have been reached. Finally, a Maryland case found that the plaintiff was unable to establish a *prima facie* case for race, sex, or maternity discrimination and that the testimony on sexual harassment was not worthy of credence.[114] A North Carolina plaintiff also failed to meet *prima facie* requirements.[115] In another case involving the denial of tenure for lack of publications and the contesting of a listing as third author of a publica-

109. Ashley v. University of Louisville, 723 S.W.2d 866 (Ky. Ct. App. 1986).
110. Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987).
111. Rios v. Board of Regents, Univ. of Ariz., 811 F.2d 1248 (9th Cir. 1987).
112. Merrill v. Southern Methodist Univ., 806 F.2d 600 (5th Cir. 1986).
113. Field v. Clark Univ., 817 F.2d 931 (1st Cir. 1987).
114. Monroe-Lord v. Hytche, 668 F. Supp. 979 (D. Md. 1987).
115. Latimore v. University of N.C. at Charlotte, 669 F. Supp. 1345 (W.D.N.C. 1987).

tion, the court awarded attorney's fees to the institution for the plaintiff's frivolous suit.[116]

Several cases involved the nonrenewal of tenure track contracts. In one case, the court found that a letter sent prior to the end of the contract period did not imply immediate firing, but rather was a notice of nonrenewal.[117] Several cases involved the nonrenewal of a contract where oral discussions at hiring were perceived by the plaintiff to be a guarantee of contract renewal up through tenure review. In each of these cases, written documentation supported the institution's option of nonrenewal at the end of the contract period.[118]

In a case involving a collective bargaining agreement, the court found that the arbitrator applied the wrong burden of proof and remanded the case.[119] The dean denied promotion when a unanimous faculty committee voted for promotion. The court found that arbitrariness under the agreement meant without reason and the institution should, on rehearing, be given the opportunity to provide reasons for its decision.

Part-time Faculty. A part-time associate professor alleged that her demotion to a research associate was motivated by gender considerations under title VII.[120] The court found that the institution's reasons for removal from the associate professor's position, lack of publications and noncollegial behavior, were valid. The retaliation claim, however, was remanded.

Other cases involving part-time faculty are covered under financial exigency.

Tenured Faculty

Termination for Cause. In an Oklahoma case, a tenured faculty member who followed instructions enclosed with the contract (signed the contract, returned it on time), but also included a note questioning the salary amount, had not reopened negotiation, thus vacating the contract. The court found the signature to represent "acceptance" and the note simply reflected his displeasure with the conditions of the contract rather than a counteroffer.[121]

116. Weinstein v. University of Ill., 811 F.2d 1091 (7th Cir. 1987); *See* The Yearbook of School Law 1987 at 248, 628 F. Supp. 862 (N.D. Ill. 1986).

117. Hill v. Talladga College, 502 So. 2d 735 (Ala. 1987).

118. Upadhya v. Langenberg, 671 F. Supp. 521 (N.D. Ill. 1987), *aff'd*, 834 F.2d 661 (7th Cir. 1987); Baker v. Lafayette College, 532 A.2d 399 (Pa. 1987), *aff'g*, *see* The Yearbook of School Law 1987 at 248, 504 A.2d 247 (Pa. Super. Ct. 1986); Brumbach v. Rensselaer Polytechnic Inst., 510 N.Y.S.2d 762 (App. Div. 1987).

119. *In re* Board of Trustees of Univ. Sys. of N.H. Keene State College, 531 A.2d 315 (N.H. 1987).

120. Gottlieb v. Tulane Univ. of La., 809 F.2d 278 (5th Cir. 1987).

121. Price v. Oklahoma College of Osteopathic Medicine and Surgery, 733 P.2d 1357 (Okla. Ct. App. 1986).

In a District of Columbia case, a professor became embroiled in a controversy when a student made slanderous comments in his class. The student, referred for disciplinary action, refused on order of the disciplinary committee to apologize to the professor and continued to attend class. The university failed to follow up and the professor refused to continue teaching his class. The institution charged him with neglect of duty and the grievance committee found him not guilty of the charge because of extenuating circumstances. The board reviewed a summary of the grievance committee report and dismissed the professor. The district court issued a summary judgment in favor of the university, finding the board had final authority in these matters.[122] On appeal, the D.C. Circuit Court found that legitimate claims existed for the case to be adjudicated. First, the court found that significant evidence existed to question whether the professor had, in fact, neglected his duty. Furthermore, the court found that the plaintiff's allegations that the institution had breached its contract when it failed to follow through on the disciplinary action against the disruptive student had significant merit and should be reviewed. Finally, the court found that the institution may have violated its due process procedures when the president transmitted a two-page summary of the grievance committee's report to the board when the faculty handbook stated that the full report must be transmitted.[123]

A Vermont case involving allegations of the forging of student evaluations was also before the court.[124] The court remanded the case on the retaliation claim and found that faculty are not subject to the state's Administrative Procedures Act. While finding that the hearings by the faculty disciplinary committee were subject to the open meeting laws, the court ruled that student evaluations which dealt with an employee's performance should not be subject to public scrutiny but would be available to the plaintiff.

In a Kansas case,[125] the court found that statutory provisions require the board to follow a unanimous decision of the hearing committee, which voted not to dismiss the faculty member who did not have tenure but was in the middle of a contract period. In a New York case, the institution had not violated any rights by refusing to remove a letter of warning of a previous employment action from the faculty member's personnel file.[126]

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122. *See* The Yearbook of School Law 1986 at 251, McConnell v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985).

123. McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1987).

124. Sprague v. University of Vt., 661 F. Supp. 1132 (D. Vt. 1987).

125. Keller v. Board of Trustees of Coffeyville Community College, 733 P.2d 830 (Kan. Ct. App. 1987).

126. Mieczkowski v. Ithica College, 516 N.Y.S.2d 534 (App. Div. 1987).

Several termination cases involved institutions with collective bargaining agreements. In an Illinois case, the court upheld an arbitrator's ruling that dismissal was not warranted where a faculty member violated policy by holding two full-time positions.[127] The institution had dismissed a faculty member for smoking marijuana with students enrolled in a class that was held at the professor's home. An arbitrator reduced the dismissal to a suspension without pay and the lower court overrode the arbitrator's ruling. Review of the arbitrator's findings by the court is limited and the lower court exceeded those limits.

Termination for Financial Exigency. In an Illinois case, tenured faculty were dismissed for financial exigencies.[129] The faculty alleged that the institution's policies and the collective bargaining agreement allowed them to bump part-time faculty in order to put together courses to yield a full-time position. The court ruled that the bumping provisions apply only to full-time positions and that the board is the determiner of an individual's competence to fill a position or teach in specific areas. A California case also affirmed the board's authority to lay-off full-time employees and to determine competency to teach in subject areas.[130]

In another case, a female faculty member was terminated for a financial exigency while two male professors with seniority were retained. The district court issued a summary judgment to the institution in the plaintiff's title IX claim.[131] Later, at trial, the court found that the institution had established a valid reason, seniority, for its action in relation to plaintiff's title VII claim. The circuit court affirmed those decisions and ruled that it needed to consider the plaintiff's claim that the program she was involved in received federal funds under title IX, because the claim was actionable and disposed of under title VII.[132]

In Massachusetts, a faculty member who was terminated, rehired, and then notified that the contract would not be completed, was given due process even though the hearing was held after the termination.[133] The court also affirmed the state's authority to terminate a contract because of financial necessity.[134] In a Washington case, the court af-

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127. Community College Dist. 508 v. McKinley, 513 N.E.2d 951 (Ill. App. Ct. 1987).

128. Lansing Community College v. Lansing Community College Chapter of Mich. Ass'n of Higher Educ., 409 N.W.2d 823 (Mich. Ct. App. 1987).

129. Biggiam v. Board of Trustees of Community College Dist. 516, 506 N.E.2d 101 (Ill. App. Ct. 1987).

130. Duax v. Kern Community College Dist., 241 Cal. Rptr. 860 (Ct. App. 1987).

131. *See* The Yearbook of School Law 1986 at 242, Mabry v. State Bd. for Community Colleges and Occupational Educ., 597 F. Supp. 1235 (D. Colo. 1984).

132. Mabry v. State Bd. of Community College and Occupational Educ., 813 F.2d 311 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 148 (1987).

133. Jermain v. Board of Regents of Higher Educ., 503 N.E.2d 50 (Mass. App. Ct. 1987).

134. *Id.* at 52.

firmed the program specific nature of financial exigencies which would allow the institution to reduce staff in one program while hiring in another.[135] In a case involving a college operating under a collective bargaining agreement, the court found that the reduction in force provisions for temporary nontenured faculty in the collective bargaining agreement was void where it conflicted with board regulations.[136]

Collective Bargaining

A case involving the same issues as the *Yeshiva*[137] decision was decided in Florida.[138] The court ruled that the college faculty were not managerial and, therefore, were qualified to organize as a collective bargaining unit. A California court ruled that a prospective bargaining unit could use the intercampus mail system in the process of organizing the collective bargaining unit.[139]

The collective bargaining agent lacked standing to litigate a case where the dismissed employee was not a member of the union.[140] In another ruling, the court found that the college arbitration procedures could not be used to resolve alleged violations (sexual harassment) since those violations were not incorporated into the collective bargaining agreement.[141]

A number of allegations of unfair labor practices were before the courts. In New York, the court ruled that it was not an unfair labor practice to reduce the load of the faculty person representing a group of faculty where the group has made no attempt to organize.[142] The court also found that a salary dispute that came about during the expired agreement, but was settled under the new agreement, had rendered the action dismissible.[143] A Washington court found an unfair labor practice in the institution's denial of released time to faculty who were negotiating for the union.[144]

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135. Refai v. Central Wash. Univ., 742 P.2d 137 (Wash. Ct. App. 1987).

136. Board of Trustees of Community College Dist. 508 v. Federation of College Clerical and Technical Personnel, Local 1708, 505 N.E.2d 1264 (Ill. App. Ct. 1987).

137. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

138. NLRB v. Florida Memorial College, 820 F.2d 1182 (11th Cir. 1987).

139. Regents of the Univ. of Cal. v. Public Employment Relations Bd., 227 Cal. Rptr. 57 (Ct. App. 1987), *prob. juris. noted*, 107 S. Ct. 3226 (1987).

140. Guild of Admin. Officers of Suffolk County Community College v. County of Suffolk, 510 N.Y.S.2d 914 (App. Div. 1987).

141. County of Rockland v. Rockland County Community College Fed'n of Teachers, 509 N.Y.S.2d 608 (App. Div. 1987).

142. Rosen v. Public Employment Relations Bd., 510 N.Y.S.2d 180 (App. Div. 1986).

143. Faculty Ass'n of Suffolk County Community College v. Public Employment Relations Bd., 508 N.Y.S.2d 591 (App. Div. 1987).

144. Green River Community College Dist. No. 10 v. Higher Educ. Personnel Bd., 730 P.2d 653 (Wash. 1986).

In a time of financial crisis, it was not an unfair labor practice for the institution to propose a wage freeze in lieu of layoffs of clerical staff.[145] In Pennsylvania, the court found an unfair labor practice in the deduction of unemployment compensation for summer, a time when the plaintiff was not under the annual contract, in the institution's payment of an arbitrator's award of back pay and reinstatement.[146] Another decision found the state system of higher education guilty of an unfair labor practice because faculty were compensated differently for "course by special arrangement" and "individualized instruction."[147] The case also affirmed the board's authority to rescind the arbitrator's ruling. Finally, a New York court found that the grievance procedures were the exclusive remedy of the plaintiff, an adjunct faculty member, in the resolution of a conflict over class scheduling.[148]

Administration and Staff

In a case involving a member of the board of trustees, felony charges were brought for receipt of a bribe to influence a board vote on a pending contract award.[149] The court ruled that the education code which made acceptance of a bribe a misdemeanor did not bar a felony charge under the penal code.

A number of cases involve controversies surrounding the appointment to or removal from academic administrative positions. The court found a faculty member removed from the directorship of a center lacked a property interest in the directorship.[150] In a similar ruling, the court cited not only the lack of property interest, but also institutional policy which prohibited the acquisition of tenure based on the performance of administrative duties.[151] In another case, the court reversed the lower court's issuance of a preliminary injunction against the institution in its removal of a department head.[152] The court found on appeal that the institution's academic autonomy, severely hampered by the injunction, outweighed the loss of the plaintiff's bonus funds which were recoverable in a pending civil rights action.[153] In another case involving

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145. Schoolcraft College Ass'n of Office Personnel/MESPA v. Schoolcraft Community College, 401 N.W.2d 915 (Mich. Ct. App. 1987).

146. Association of Pa. College and Univ. Faculty v. Pennsylvania Labor Relations Bd., 532 A.2d 60 (Pa. Commw. Ct. 1987).

147. State Sys. of Higher Educ. v. PLRB, 528 A.2d 278 (Pa. Commw. Ct. 1987).

148. Post Adjunct Faculty Ass'n v. Board of Trustees, 511 N.Y.S.2d 874 (App. Div. 1987).

149. Robinson v. Superior Court, 237 Cal. Rptr. 75 (Ct. App. 1987).

150. Chiriboga v. Saldana, 660 F. Supp. 618 (D.P.R. 1987).

151. Jimenez-Torres De Panepinto v. Saldana, 834 F.2d 25 (1st Cir. 1987).

152. *See* The Yearbook of School Law 1987 at 256, Vargas-Figueroa v. Saldana, 646 F. Supp. 1362 (D.P.R. 1986).

153. Vargas-Figueroa v. Saldana, 826 F.2d 160 (1st Cir. 1987).

the appointment of a department head, the court ordered the plaintiff hired,[154] where the plaintiff was the recommended candidate and institutional policy as part of the plaintiff's contract required the dean to reconstitute the search committee within a reasonable time after refusing the recommendation. The court found the two-year delay to be a breach of the employment contract and, while reversing the trial court's order to appoint him to the position, ordered damages equivalent to the salary he would have received had he been appointed.

Cases also involved appointment or removal of staff for cause. In one case, the court upheld the removal of a police officer for gambling in his office, finding no reasonable expectation of privacy in the employee's office.[155] In a Florida case, the court reversed a hearing officer's ruling, finding that the institution did not have to grant compulsory disability leave before dismissal where the employee suffered from alcoholism and denied he had a problem.[156] In a similar case, the court found that three warnings after low job performance ratings were not a vague or overly broad basis for dismissal.[157]

In a case previously before the courts,[158] the circuit court found that under New York law the secretary to the president served at the pleasure of her supervisor contrary to letters giving her an appointment to a permanent position.[159] The court found the plaintiff unable to substantiate a property interest requiring due process.

The Fifth Circuit found that a state court order to pay the plaintiff's salary for the remainder of a contract period removed any property right claim of a public safety director terminated in the middle of a contract period.[160] Other courts ruled that sovereign immunity blocked action in a financial exigency dismissal[161] and an inadequate performance case.[162] An Alabama court failed to find duress in the notification of nonrenewal of plaintiff's contract and his subsequent resignation.[163] A Michigan court dismissed a claim over termination because the plaintiff and counsel had made no progress in their suit.[164]

Removal from athletic positions was also litigated. The court found that a basketball coach on a one-year contract had no reason to expect

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154. University of Minn. v. Goodkind, 399 N.W.2d 585 (Minn. Ct. App. 1987).
155. Thornton v. University Civil Serv. Merit Bd., 507 N.E.2d 1262 (Ill. App. Ct. 1987).
156. University of Fla. v. Mossburg, 503 So. 2d 404 (Fla. Dist. Ct. App. 1987).
157. University of Fla. v. Moore, 506 So. 2d 69 (Fla. Dist. Ct. App. 1987).
158. *See* The Yearbook of School Law 1987 at 257, Wright v. Cayan, 642 F. Supp. 947 (N.D.N.Y. 1986).
159. Wright v. Cayan, 817 F.2d 999 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 157 (1987).
160. Robinson v. Boyer. 825 F. 2d 64 (5th Cir. 1987).
161. Lewis v. Kelchner, 658 F. Supp. 358 (M.D. Pa. 1986).
162. Stokes v. University of Tenn. at Martin, 737 S.W.2d 545 (Tenn. Ct. App. 1987).
163. Ellis v. Owens, 507 So. 2d 436 (Ala. 1987).
164. Maxwell v. University of Mich., 407 N.W.2d 16 (Mich. Ct. App. 1987).

renewal of the contract.[165] Another court found an athletic director who served at the will of the president lacked a claim in removal.[166] A federal district court also found that poor performance as a reason for the dismissal of an academic coordinator for athletes was not a pretext to discrimination based on gender.[167]

A state court remanded a case rejecting an immunity claim were the president refused to implement grievance procedures in the removal of a counselor.[168] An Arizona court affirmed the summary judgment dismissal of a case where an "at will" employee was dismissed resulting from position elimination through reorganization.[169] In South Carolina, the court ruled that pending administrative remedies must be exhausted before proceeding with judicial remedies.[170]

In a hiring case alleging sexual harassment by the interviewer of an applicant for a position, the defense requested the plaintiff to undergo a medical examination. The court affirmed the order for an exam but limited inquiry, affirming the plaintiff's right to sexual privacy, but rejected the plaintiff's request to have counsel present.[171] In another case, a plaintiff assumed he had been hired for a position when he was given the keys to an office, watched game films and was given use of a car whose insurance policy listed him as an employee. The court found evidence sufficient to support a finding that the contract for employment had not been offered.[172]

Denial of Employee Privilege

In a case where the plaintiff, a faculty member, was censured for plagarism, the court dismissed the claim for its failure to be concise.[173] A California litigation involved charges of breach of good faith and infliction of emotional distress surrounding the university's investigation of unethical research charges the plaintiff brought against a former colleague.[174] Allegations by the colleague against the plaintiff were contained in a disciplinary report on the colleague and the court found that the university was not obligated to release that report to the plaintiff.

In a federal case, the court upheld a board decision not to promote

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165. Lindsey v. Dempsey, 735 P.2d 840 (Ariz. Ct. App. 1987).
166. Hill v. California State Univ. Sys. Trustees, 238 Cal. Rptr. 799 (Ct. App. 1987).
167. Gray v. University of Ark., 658 F. Supp. 709 (W.D. Ark. 1987).
168. Perry v. Texas A. & I. Univ., 737 S.W.2d 106 (Tex. Ct. App. 1987).
169. Valles v. Arizona Bd. of Regents, 743 P.2d 960 (Ariz. Ct. App. 1987).
170. Medical Univ. of S.C. v. Taylor, 362 S.E.2d 881 (S.C. Ct. App. 1987).
171. Vinson v. Superior Ct., 740 P.2d 404 (Cal. 1987).
172. Bruner v. University of S. Miss., 501 So. 2d 1113 (Miss. 1987).
173. Newman v. Massachusetts., 115 F.R.D. 341 (D. Mass. 1987).
174. Dong v. Board of Trustees of Leland Stanford Junior Univ., 236 Cal. Rptr. 912 (Ct. App. 1987).

the plaintiff.[175] The private university board's decision was consistent with both the faculty committee and the hearing grievance committee, but was contrary to the grievance appeal committee's decision. The institution's motion for summary judgment was upheld.

In a case involving summer school pay, a professor claimed he was not treated equitably when he did not receive reduced load assignments during the academic year for six semesters of overload assignments.[176] The court found that he was paid a full salary for six semesters of reduced load when full pay during summer session is the same as an academic semester. In another case over summer session pay, an instructor failed to show that his contract for summer session teaching was inconsistent with board policy.[177]

Denial of Employee Benefits

The 1984 Deficit Reduction Act[178] decoupled the collection of withholding and social security tax and required the retroactive collection of social security tax on retirement annuity accounts. The court, citing two cases,[179] found that the statute did not violate due process, equal protection, or separation of powers by the assessment of the retroactive tax.[180]

Plaintiffs brought suit contesting failure of the university to grant salary awards approved by the legislature.[181] The university argued that as a position was vacated, the salary offered to the new employee could be at a lower rate than that appropriated by the legislature under the act. The court, granting summary judgment to the plaintiffs, found that the legislative intent was to upgrade the salaries of all positions, and the increased appropriations should stay with the position. In another case, the court found that the tuition waiver benefit could be changed without violating the contract of an employee not on fixed term.[182]

In a question on retirement benefits, the retirement commission ruling that a full-time faculty member with ten years of service had credit for only eight and a half years because she was under a ten month contract, was upheld in state court.[183] An employee, in a trial court divorce settlement, awarded ownership of interest and stocks for a

175. Kyriakopoulos v. George Washington Univ., 657 F. Supp. 1525 (D.D.C. 1987).
176. Stark v. Troy State Univ., 514 So. 2d 46 (Ala. 1987).
177. Barnes v. Patrick Henry State Junior College, 515 So. 2d 1257 (Ala. Civ. App. 1987).
178. Pub. L. No. 98-369, § 2662(g).
179. *See* The Yearbook of School Law 1986 at 228, Temple Univ. v. United States, 769 F.2d 126 (3d Cir. 1985). *See* The Yearbook of School Law 1987 at 254, Canisius College v. United States, 799 F.2d 18 (2nd Cir. 1986).
180. Robert Morris College v. United States, 11 Cl. Ct. 546 (1987).
181. University of Tex. at Austin v. Joki, 735 S.W.2d 505 (Tex. Ct. App. 1987).
182. Wall v. Tulane Univ., 499 So. 2d 375 (La. Ct. App. 1986).
183. Bania v. New York State Employment Sys., 516 N.Y.S.2d 588 (Sup. Ct. 1987).

specific amount of assets in a retirement fund held by an annuity company to his ex-wife. The wife attempted a garnishment of the sum and the court granted summary judgment to the annuity company.[184] In Illinois, the state court ruled that an act which made those eligible to purchase military service credit ineligible to receive the credit after a certain date, violated the state constitution.[185] In another case, the court ruled that the state coordinating agency could not bind the state retirement system to a contract.[186] An expresident of one of the state institutions had an exit agreement which would allow him to continue to buy into the state retirement system. The retirement board refused the plaintiff's contribution since he was no longer an employee of the state.

A retiree's claim for disability benefits was denied because he failed to show that work related chemical exposure was the cause of his respiratory ailment.[187] In South Dakota, the court overturned the retirement system's denial of disability benefits where the disability was job related and the employee now held a job with less salary than the one his disability prevented him from doing.[188] In another case, the plaintiff was awarded disability benefits for an injury received while teaching a class.[189] In North Carolina, the court found the industrial commission had the authority to award attorney's fees in a disability action.[190]

Denial of health benefits was also alleged. In one case, the court agreed to hear the merits of a breach of contract and damages claim for the over assessment by $5,000 of the plaintiff's compensation for health care benefits for which a refund had been received.[191] In another case, the alleged malicious prosecution of a former employee by the president resulted in an award of damages.[192] Illness requiring medical treatment was caused by the president's action. A Pennsylvania case involved health care benefits terminated after it was determined that a child, disabled since birth, was not eligible for the benefits.[193] The court found that the institution's claim against the third party insurance company, which had been making payments to the employee, was upheld and motions to dismiss were denied. The case awaits determination on the merits.

Several cases involved the denial of unemployment compensation for the summer months when the person would be returning to the

184. Dyer v. Investors Life Ins. Co. of N. Am., 728 S.W.2d 478 (Tex. Ct. App. 1987).
185. Buddell v. Board of Trustees of State Retirement Sys., 514 N.E.2d 184 (Ill. 1987).
186. Watrel v. Commonwealth, Dept. of Educ., 518 A.2d 1158 (Pa. 1986).
187. Andrews v. Division of Retirement, 508 So. 2d 477 (Fla. Dist. Ct. App. 1987).
188. *In re* Templeton, 403 N.W.2d 398 (S.D. 1987).
189. Killen v. Continental Ins. Co., 514 So. 2d 711 (La. Ct. App. 1987).
190. Karp v. University of N.C., 362 S.E.2d 825 (N.C. Ct. App. 1987).
191. Sanders v. Judson College, 514 So. 2d 890 (Ala. 1987).
192. Eggleston v. Ellis, 724 S.W.2d 462 (Ark. 1987).
193. Krupp v. Lincoln Univ., 663 F. Supp. 289 (E.D. Pa. 1987).

institution in the fall.[194] An employee who laid down on the job due to a dizzy spell and was then dismissed, was not substantially at fault, when the policy was ambiguous, and did qualify for unemployment benefits.[195] An employee who quit her job to go to graduate school was denied unemployment benefits since she could have returned to her job in the fall.[196]

STUDENTS

Admissions

The Supreme Court[197] refused to hear a case in which the circuit court found that the Educational Testing Service was not an agent of state government requiring due process in the cancellation of the test scores and in the notification of cancellation sent to the law school without explanation.[198]

In a question on admission of a conditionally released prisoner, a suit resulted from the murder and rape of college students and the stabbing of a nonstudent. The plaintiffs alleged the college was responsible for the actions of the prisoner, who was granted admission to the college. The court held that the state was not negligent in releasing the prisoner since it was required to do so by law. Furthermore, the prison physician's negligence by inaccurately completing the prisoner's health forms (citing no emotional instability when it existed) did not extend to students. Finally, the college did not have a duty to restrict the prisoner's activity on campus to protect other students.[199]

A black student suffering from alcoholism brought suit claiming handicap and race discrimination in the university's refusal to readmit him to law school.[200] The court, while acknowledging a recovered alcoholic as being handicapped under 504, ruled that the student could not maintain the required academic standards of the law school and was not an otherwise qualified handicapped individual. Race was not found to be a factor in the readmission decision. In Michigan, a university's doctoral candidate denied admission brought suit against the university

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194. University of Toledo v. Heiny, 507 N.E.2d 1130 (Ohio 1987); *In re* Sifakis, 519 N.Y.S.2d 433 (App. Div. 1987).

195. Baxter v. Bowman Gray School of Medicine, 361 S.E.2d 109 (N.C. Ct. App. 1987).

196. Wurster v. Commonwealth, Unemployment Compensation Bd., 518 A.2d 350 (Pa. Commw. Ct. 1986).

197. Johnson v. Educational Testing Serv., 105 S. Ct. 3504 (1985).

198. *See* The Yearbook of School Law 1986 at 263, Johnson v. Educational Testing Serv., 615 F. Supp. 633 (D. Mass. 1984).

199. Eiseman v. State, 518 N.Y.S.2d 608 (N.Y. 1987).

200. Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987).

202

under a state civil rights act.[201] The court found that post-traumatic stress disorder was not substantiated by the plaintiff as a handicap. The plaintiff, rather than show that she was an otherwise qualified handicapped individual, claimed the program should establish special admission criteria for her.[202]

In a case on appeal, the plaintiff, a white male, alleged age and race discrimination and sought a preliminary injunction compelling his admission to an institution. The district court ruled that federal action was barred under the principle of *res judicata* since the plaintiff had previously brought proceedings under article 78 in a New York court. The circuit court reversed and remanded the case for trial.[203]

In Connecticut, an applicant denied admission to the university's graduate English department in 1981 brought suit alleging he was discriminated against in violation of the Rehabilitation Act and Age Discrimination Act. The action was dismissed since the English department did not receive federal funds in that year.[204] A Colorado Vietnam War veteran brought charges of violation of due process and seven other claims that stretched back to 1969. The court found the claims, which included the denial of admission to law school in 1983, to be time barred.[205]

In a Kansas case, the federal circuit court heard an appeal by plaintiffs filing action for discrimination in admission based on their, and their father's association with civil rights causes.[206] In a previous case,[207] the court awarded summary judgment to the university, but failed to set attorney's fees. The claims on appeal were dismissed due to lack of jurisdiction until final fees have been set. In Ohio, a student who participated in a summer prelaw qualification program at the university alleged the university was precluded from maintaining as part of his undergraduate record attendance at and achievement in the summer qualification program. The court found no violation of law in the maintenance and consideration of this information in the admissions process. Furthermore, the suit was time barred.[208]

Cases relating to admissions, but involving admission to the profes-

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201. Mich Comp Law § 37.1101.

202. Crancer v. Board of Regents of Univ. of Mich., 402 N.W.2d 90 (Mich. Ct. App. 1986).

203. Davis v. Halpern, 813 F.2d 37 (2d Cir. 1987).

204. Stephanidis v. Yale Univ., 652 F. Supp. 110 (D. Conn. 1986).

205. Arko v. United States Air Force Reserve Officer Training Program, 661 F. Supp. 31 (D. Colo. 1987).

206. Phelps v. Washburn Univ., 807 F.2d 153 (10th Cir. 1986).

207. *See* The Yearbook of School Law 1987 at 260, Phelps v. Washburn Univ., 634 F. Supp. 556 (D. Ka. 1986).

208. Smith v. Ohio N. Univ., 514 N.E.2d 142 (Ohio Ct. App. 1986).

sion after completion of a college program, were before the courts. Law school graduates who received an education at an unaccredited law school petitioned for admission to the state bar. The court agreed that the education they had received was substantially similar or functionally equivalent to that provided at an ABA-accredited school. Those students who graduated and had met all other requirements should now be seated at the Nevada Bar even though the school had not received full accreditation.[209] In Illinois, a plaintiff alleged defamation by his former employer based on statements requested by and made to the Character and Fitness Committee of the Illinois Supreme Court. The court found that the committee was a quasi-judicial body, and the statements made to the committee in response to an inquiry were privileged communication.[210]

Financial Aid

A student alleged a breach of contract for the institution's failure to award him a degree removing his obligation to repay the student loan. The Eleventh Circuit[211] affirmed a district court decision[212] and rejected the student's claim.

The question of federal certification of an institution's eligibility to participate in federal student financial aid programs was litigated. A seminary sought review by the district court of a department of education's determination that it did not qualify to participate in student financial assistance programs and had been required to return sums of money previously paid.[213] The circuit court affirmed the department of education's interpretation of the Higher Education Act of 1965 allowing unaccredited institutions eligibility for aid only if students actually transferred credits to each of the three accredited institutions.[214] The seminary was ordered to return previous student financial assistance program payments.

Several cases involved institutional claims against state agencies surrounding their qualification under various student aid programs.[215] A

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209. Bennett v. State Bar of Nev., 746 P.2d 143 (Nev. 1987).

210. Kalish v. Illinois Educ. Ass'n, 510 N.E.2d 1103 (Ill. App. Ct. 1987).

211. Olavarrieta v. United States, 812 F.2d 640 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 152 (1987).

212. *See* The Yearbook of School Law 1987 at 263, Olavarrieta v. United States, 632 F. Supp. 895 (S.D. Fla. 1986).

213. See The Yearbook of School Law 1987 at 263, Beth Rochel Seminary v. Bennett, 624 F. Supp. 911 (D.D.C. 1985).

214. Beth Rochel Seminary v. Bennett, 825 F.2d 478 (D.C. Cir. 1987).

215. Board of Trustees of Community College Dist. No. 508 v. Burris, 515 N.E.2d 1244 (Ill. 1987); Duchess Community College v. Regan, 519 N.Y.S.2d 782 (Sup. Ct. 1987); *In re* Bible Speaks, 69 B.R. 368 (Bankr. D. Mass. 1987).

father petitioned the court for relief from a child's tuition support obligation after his son had received failing grades one semester. The father's obligation, paying tuition for each semester the son pursued full-time course work and maintained passing grades, was part of a family court settlement. The state court held that the agreement was not subject to termination, but required a semester by semester determination. The father was released of the obligation only for the semester the son had failing grades.[216]

Procedures and qualifications under financial aid programs were also before the courts. In New York, the court affirmed the tie-breaking procedure—ranking SAT scores by the verbal portion of the test—as an equitable method to select scholarship awards.[217] The Supreme Court of Arkansas ruled that the state legislative action, raising the population definition for a rural area for the allowance of service credit in a scholarship program, did not retroactively relieve the plaintiff from his loan obligations under the loan agreement.[218] In Arkansas, the court affirmed the decision of the unemployment compensation board of review and denied unemployment compensation benefits to a college instructor who refused to comply with the college policy requiring employees who default on student loans to set up a repayment schedule. The court ruled that the instructor was guilty of willful misconduct and that the instructor's hardship claim due to family expenses was an insufficient justification for her refusal to comply with policy.[219]

A number of cases involved attempts to have student loans discharged because of undue hardship under chapter seven of the bankruptcy laws. In a number of cases, the debtor was unable to maintain undue hardship because of unemployment,[220] injuries,[221] or other reasons.[222] However, in other cases, the loan was discharged based on a finding of undue hardship,[223] or injury,[224] or on a finding that the co-maker was not held responsible for the repayment.[225] In another

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216. Acrey v. Acrey, 356 S.E.2d 437 (S.C. Ct. App. 1987).

217. Eisbruck v. New York State Educ. Dep't 520, N.Y.S.2d 138 (Sup. Ct. 1987).

218. Arkansas Rural Medical Practice Student Loan and Scholarship Bd. v. Luter, 729 S.W.2d 402 (Ark. 1987).

219. Azzari v. Commonwealth Unemployment Compensation Bd. of Review, 521 A.2d 539 (Pa. Commw. Ct. 1987).

220. Brunner v. New York State Higher Educ. Serv., 831 F.2d 395 (2d Cir. 1987); *In re* Courtney, 79 B.R. 1004 (Bankr. N.D. Ind. 1987); *In re* Lisanti, 77 B.R. 27 (Bankr. W.D. Pa. 1987); Lohman v. Connecticut Student Loan Found., 79 B.R. 576 (Bankr. D. Vt. 1987).

221. *In re* Carter, 77 B.R. 25 (Bankr. E.D. Pa. 1987).

222. *In re* Osborn, 72 B.R. 691 (Bankr. W.D. Mo. 1987).

223. Indiana Univ. v. Canganelli, 501 N.E.2d 229 (Ill. App. Ct. 1986).

224. *In re* Alliger, 78 B.R. 96 (Bankr. E.D. Pa. 1987).

225. Northwestern Univ. Student Loan Office v. Behr, 80 B.R. 124 (Bankr. N.D. Iowa 1987).

chapter seven case, conflicting statutes[226] were balanced to reach a ruling. The court ruled that the provision[227] of exhausting the five-year period for pay back before a loan can be declared dischargeable governed.[228] In Rhode Island, the court refused to rule on dischargeability until the state's unemployment compensation commission ruled on the disability.[229]

Chapter thirteen proceedings were also before the court. The court rejected a pay back plan because allocations in other areas of the debtors budget were outside specifications under the provisions.[230] In one case, the repayment plan for a portion of the debt was approved and attorney's fees were awarded to the debtor because of the way the government filed claims.[231] Several cases upheld the department of education's action to garnish federal tax refunds to meet defaulted loan obligations.[232]

The fulfillment of service contracts after graduation as part of the award of a scholarship was also litigated. Several debtors were found to be in breach of their service contract by failing to: serve in a health manpower shortage area;[233] a medical residency for longer than one year;[234] locate in a particular area;[235] and choose a specific area of specialization.[236]

A case involved harassment by a collection agency in its attempt to collect a defaulted loan.[237] The plaintiff brought action under the Fair Debt Collections Practices Act, claiming bad faith and harassment. The court held that early morning calls were a bona fide error. Also, the university could withhold the college transcripts if loan payments were in default. In this particular case, since the debts had been discharged in bankruptcy court, withholding the transcripts was misleading as a matter of law. The case was remanded to the lower court for a ruling on state claims.

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226. 11 U.S.C. § 523(a)(8), 42 U.S.C. § 254o(c)(3).
227. 42 U.S.C. § 254o(c)(3).
228. *In re* Brown, 79 B.R. 789 (Bankr. N.D. Ill. 1987).
229. *In re* Wilson, 76 B.R. 19 (Bankr. D.R.I. 1987).
230. *In re* Sutliff, 79 B.R. 151 (Bankr. N.D.N.Y. 1987); *In re* Makarchuk, 76 B.R. 919 (Bankr. N.D.N.Y. 1987).
231. *In re* Cleveland, 80 B.R. 204 (Bankr. S.D. Cal. 1987).
232. Gerrard v. United States Office of Educ., 656 F. Supp. 570 (N.D. Cal. 1987); Swaney v. Secretary, United States Dep't of Educ., 664 F. Supp. 172 (D. Del. 1987).
233. United States v. Bills, 822 F.2d 373 (3d Cir. 1987); *See* The Yearbook of School Law 1987 at 263, United States v. Bills, 639 F. Supp. 825 (D.N.J. 1986); United States v. Turner, 660 F. Supp. 1323 (E.D.N.Y. 1987).
234. United States v. Redovan, 656 F. Supp. 121 (E.D. Pa. 1986).
235. Fisher v. Bowen, 659 F. Supp. 784 (D. Or. 1987); United States v. Fowler, 659 F. Supp. 624 (N.D. Cal. 1987).
236. Board of Trustees of State Inst. of Higher Learning v. Johnson, 507 So. 2d 887 (Miss. 1987).
237. Juras v. Aman Collection Serv., Inc., 829 F.2d 739 (9th Cir. 1987).

Several cases involved payment for courses offered to military personnel. A California case brought before the court by the United States to recover alleged overpayments of tuition made to a college providing study for active military duty personnel was ruled time barred. The court held the statutory period began when the responsible office could have known of the overpayment, rather than at the later date when the veteran's administration issued a report.[238] In Ohio, a college filed an action to recover allegedly unpaid tuition fees for an extension course taken by a serviceman. The court ruled in favor of college. After three years, the serviceman appealed the denial of his motion to vacate a default judgment. The court of appeals held that since the serviceman had waited three years to file suit, Ohio procedural law offered no remedy.[239]

First Amendment

Freedom of Religion. The university's policy requiring foreign students to carry health insurance did not violate equal protection, due process, or the first amendment.[240] The students were unable to prove that the policy interfered with religious freedom. The Sixth Circuit dismissed the case as moot since the students were no longer enrolled at the university.[241]

Freedom of Speech. The Sixth Circuit affirmed[242] a district court ruling[243] that a state-operated art theater's cancellation of a controversial film, at the request of a state senator, was a state action and an unconstitutional deprivation of students' first amendment rights to receive information and ideas.

Several cases involved controversies surrounding institutional policies toward corporations doing business in South Africa. Students from the University of Virginia brought suit seeking an injunction against enforcement of a lawn regulation which prohibited the erection of symbolic shanties on certain areas of the university's campus.[244] The court held that the university regulations were vague and too broad to satisfy the university's legitimate interest in maintaining the aesthetics of the grounds, and the alternative locations provided for shanties did not provide meaningful alternative channels for expression. In a later case,

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238. United States v. Gavilan Joint Community College Dist., 662 F. Supp. 309 (N.D. Cal. 1986).

239. Urbana College v. Conway, 502 N.E.2d 675 (Ohio Ct. App. 1985).

240. Ahmed v. University of Toledo, 664 F. Supp. 282 (N.D. Ohio 1986).

241. Ahmed v. University of Toledo, 822 F.2d 26 (6th Cir. 1987).

242. Brown v. Board of Regents of Univ. of Neb., 669 F. Supp. 297 (D. Neb. 1986).

243. *See* The Yearbook of School Law 1987 at 264, Brown v. Board of Regents of Univ. of Neb., 640 F. Supp. 674 (D. Neb. 1986).

244. Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 33 (W.D. Va. 1987).

students brought action to enjoin the enforcement of the university's revised lawn-use policy, which resulted in the removal of shanties from the front of the Rotunda.[245] The court found the revised policy as a content-neutral regulation aimed at protecting the university's aesthetic concern in architecture, while permitting students a wide array of alternative modes of expression. The revised policy eliminated vagueness and did not violate constitutional protections of free speech.

In another apartheid case, a student group brought suit challenging the university's order to remove shanties erected on campus in protest of South Africa's apartheid system and the university's investment policies.[246] The court held that the shanties presented a symbolic message protected under the first amendment. The court also determined that the campus is a public forum for students, but that the university has the authority to appropriately regulate student expression. The order making the shanties portable for removal at night served all interests and was permissible.

In a related case, publishers of an independent student newspaper challenged the university rule prohibiting plaintiffs from personally distributing their newspaper containing third party advertisements at student organization tables on campus. The court ruled that distribution from unmanned stands did not violate freedom of speech, press, or association under the United States or Texas constitutions.[247] A federal district court ruled that it was appropriate to require a permit for the distribution of literature on campus.[248]

The level of constitutional guarantees for commercial speech was also litigated. A corporation and students brought suit seeking declarative and injunctive relief against institutions of higher education and university officials over the refusal to permit the corporations to conduct product demonstrations in student dormitory rooms. The district court found that the student rooms were limited public forums with the intent of facilitating social, cultural, and educational activities, not commercial speech. Refusal was thus ruled as viewpoint neutral and consistent with the institution's educational mission.[249]

In Arkansas, students brought suit against a student newspaper alleging refusal to print sexual preference in classified advertisements was a violation of the first amendment. The court determined that the

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245. Students Against Apartheid Coalition v. O'Neil, 671 F. Supp. 1105 (W.D. Va. 1987).

246. University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200 (D. Utah 1986).

247. Texas Review Soc'y v. Cunningham, 659 F. Supp. 1239 (W.D. Tex. 1987).

248. City of Parma v. Manning, 514 N.E.2d 749 (Ohio Ct. App. 1986).

249. Fox v. Board of Trustees of State Univ. of N.Y., 649 F. Supp. 1393 (N.D.N.Y. 1986).

newspaper was not an agent of state government and its editorial policy does not represent state action implicating constitutional guarantees.[250]

Freedom of Expression. A gay student rights association brought suit against university officials after being denied funding by the student senate.[251] The defendants held that since the organization had not sought funding for two years, the case was moot. Instead, the court ruled that given the fact that the funding procedures had not changed and the organization was still active, the issue warranted examination. The court held that the organization was entitled to no relief since student legislative denial of funding was rationally related to the distribution of limited funds in a manner which best benefited the entire campus. Denial of funds did not infringe upon the association's constitutional rights.

Dismissal

Disciplinary Dismissal. Students at a private college who were dismissed without a hearing for participating in a sit-in, brought suit against the president and the dean of the college under civil rights statutes alleging discrimination and denial of due process rights.[252] The Second Circuit, relying on an earlier decision[253] and reversing the lower court, found state action since the college adopted a disciplinary code, which was on file with the state, in compliance with the state code. In Pennsylvania, a student who received a suspended suspension for a major violation of the student code of conduct, lacked standing to raise a due process claim because he was not dismissed.[254]

A law student brought suit against three state university officials for alleged deprivation of due process and first amendment rights as a result of a disciplinary suspension.[255] The court concluded that the student, who attended a rally as a "legal observer," was not denied due process since he had the opportunity to state his intentions to university officials before the demonstration and was warned that all who remained in the building after the 2:00 p.m. closing would be arrested. First amendment rights, according to the court, were not violated since being prevented from entering university property or attending university events would not preclude participation in political activity or speaking on any subject at other locations.

In a case involving academic dishonesty, two students suspended

250. Sinn v. The Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987).
251. Gay and Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045 (W.D. Ark. 1987).
252. Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987).
253. Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).
254. Beaver v. Ortenzi, 524 A.2d 1022 (Pa. Commw. Ct. 1987).
255. Rosenfeld v. Ketter, 820 F.2d 38 (2d Cir. 1987).

from the university's school of veterinary medicine, brought action seeking injunctive relief and damages for violations of their constitutional rights.[256] The court held that the students were advised in writing of charges of academic dishonesty, given at least seventy-two hours notice prior to a hearing, allowed to indirectly question witnesses, and permitted to be present during testimony and they were afforded a fair hearing. Furthermore, evidence presented at the hearing supported the allegations.

A high school student sued to gain a hearing after being discharged from a summer college program for use of marijuana and alcohol.[257] The student, who admitted to use of illicit substances, was properly discharged based on the summer college code used for high school students. The court found that a private institution's receipt of financial assistance from the state alone did not constitute sufficient state involvement to invoke requirements of constitutional due process.

At a private Christian college, a student who had met all requirements and paid tuition was denied his diploma when a rumor circulated that he was a homosexual.[258] The college imposed an order requiring the student to seek counseling. In compliance, the student saw a therapist. However, during the sessions the student revealed personal information to the therapist, believing the sessions were confidential, when, in fact, the therapist reported the sessions to the college. The student brought suit against the college and the counselor for breach of contract and violation of the Mental Health and Development Confidentiality Act.[259] The court found that when the college admitted the student, an implied contract was invoked which was violated when the college refused graduation. The therapist violated the Confidentiality Act by disclosing the student's personal thoughts.

Academic Dismissal. In Minnesota, a graduate student, academically dismissed from a doctoral degree program in psychology, sued the university for denial of procedural and substantive due process, age, sex, and emotional handicap discrimination, and pendant state claims.[260] The Eighth Circuit, citing *Ewing*,[261] noted that academic decisions are subject to judicial review which is limited to inquiry as to whether the process was a departure from the norm, arbitrary, or capricious. The court held that the plaintiff was unable to show that the procedures

256. Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987).

257. Stone v. Cornell Univ., 510 N.Y.S.2d 313 (App. Div. 1987).

258. Johnson v. Lincoln Christian College, 501 N.E.2d 1380 (Ill. App. Ct. 1986).

259. Confidentiality Act Ill. Rev. Stat. 1985 ch. 911/2 §§ 802, 803, 805.

260. Shuler v. University of Minn., 788 F.2d 510 (8th Cir. 1986), *cert denied*, 107 S. Ct. 932 (1987); *See* The Yearbook of School Law 1987 at 267.

261. *See* The Yearbook of School Law 1986 at 271, Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507 (1985).

followed to grieve her oral examination were different from common practices or were arbitrary or capricious actions.

A graduate student, who allegedly fabricated data for a master's thesis, brought a complaint to the court that he was not afforded due process when the university's board of regents rescinded his degree. The district court ruled in favor of the degree holder.[262] The circuit court, vacating the decision, held that the board of regents had the authority to rescind the academic degree under Michigan law.[263] Additionally, the student was afforded due process through a hearing at the university even though his attorney was not allowed to examine and cross-examine witnesses.

A graduate student terminated from a doctoral program brought civil rights action against the university and university officials.[264] The student filed a section 1983 action alleging discrimination based on national origin contrary to the equal protection clause. The court, on appeal, remanded the case, holding that the suit against the university was barred by the eleventh amendment. However, injunctive relief against the officials for reinstatement was available to the plaintiff on remand.

A special education doctoral student having academic difficulty was advised to switch to a program of study for students not wishing to pursue a doctorate degree. The program required comprehensive exams before graduation. The student failed the exam and was dismissed from the program. The student brought suit claiming that a promise of graduation by the academic advisor was a promissory estoppel. Furthermore, she claimed her dismissal constituted discrimination based on alleged statements and actions of the academic advisor and his wife. The court, affirming the lower court's decision, awarded summary judgment to the defendants.[265]

A black female physician terminated from a medical fellowship program at a university after excessive absenteeism and inadequate performance, brought a civil rights action against the university. The court ruled that her dismissal was not a pretext of discrimination. While she was not granted a formal hearing before the dismissal, she had been given at least two written evaluations expressing dissatisfaction and an opportunity to discuss her performance with the faculty, thus she could

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262. *See* The Yearbook of School Law 1985 at 343, Crook v. Baker, 584 F. Supp. 1531 (E.D. Mich. 1984).

263. Crook v. Baker, 813 F.2d 88 (6th Cir. 1987).

264. Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 141 (1987).

265. Cuddihy v. Wayne State Univ. Bd. of Governors, 413 N.W.2d 692 (Mich. Ct. App. 1987).

not claim she was denied due process.[266]

A student brought a section 1983 civil rights action against university personnel after being dismissed from an academic program.[267] The court, granting summary judgment, held that the student, dismissed from the program for poor academic performance after graduation requirements changed, was not denied due process. Also, a change in degree requirements is not a breach of contract when the university's bulletin contained a clause stating that the university reserved the right to modify requirements.

A nursing student at a private college was expelled due to the student's obesity.[268] The student brought action alleging wrongful expulsion, and the college moved for summary judgment. The court found the college, a private institution receiving no federal funds, was not a "state actor" subject to due process requirements. Additionally, claims of discrimination under the Rehabilitation Act can only be sought when a specific program receives federal funds. However, the student could claim intentional emotional distress and a right to privacy since college officials, before dismissal, badgered the student into losing weight. Furthermore, while private colleges are afforded wide discretion in enforcing standards, there is no basis for humiliation nor did the student's girth preclude her proficiency.

A case brought before the court by a professor stemmed from the academic dismissal of a student. The student had alleged discrimination by the university against Hispanic women. The professor wrote an affidavit supporting the claims of the student, and the university filed a defamation suit against the student, her attorney, and the professor. In the district court, the professor moved for a preliminary injunction in the civil rights action against the state judge and the private university. His motion was denied.[269] On appeal, the court held that injunctive relief is allowed against state judicial officers acting in official capacity, but the professor failed to state a cause of action cognizable under section 1983.[270]

A former medical student brought suit against officials at a university alleging they refused to re-admit her following an authorized one-year leave of absence. The court held that the letter granting her leave did not constitute an express contract. Actions by university officials were not unreasonable or arbitrary, and the student was not denied substantive

266. Hankins v. Temple Univ., 829 F.2d 437 (3d Cir. 1987).
267. Hammond v. Auburn Univ., 669 F. Supp. 1555 (M.D. Ala. 1987).
268. Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986).
269. *See* The Yearbook of School Law 1987 at 239, Paisey v. Vitale, 634 F. Supp. 741 (S.D. Fla. 1981).
270. Paisey v. Vitale, 807 F.2d 889 (11th Cir. 1986).

due process when officials balanced the student's ability to complete her coursework with the potential danger for patients.[271]

Other Constitutional Privileges

In an arrest case, a male Hispanic, wrongfully arrested, filed a civil rights suit against the city, the university, and their police as well as other state defendants. The court ruled that the eleventh amendment barred suit. The court held that mention of race to determine the identity of the suspect does not warrant racial discrimination.[272] A student living in a university-owned apartment sought appeal of his possession of marijuana and cocaine conviction. He argued that police officers wrongfully entered his apartment when he answered "Yeah" at their knock on the door. The court agreed with the student and reversed his conviction since evidence was obtained in violation of the knock and wait rule.[273]

Voting rights were before the courts when a town moved a polling site to an off-campus location and college students sued. The court ruled that the new location, while less convenient, did not impose a substantial burden on students and did not constitute a violation of their right to vote.[274] In another polling case, the county commissioner's rejected university students' voter registration. Students brought a class action suit against the state and county election boards and the independent commissioners for injunctive relief to enable students residing at the state university to vote as residents of the community. The court affirmed the lower court opinion[275] by upholding the New York election law definition of "residence" as constitutionally permissible so long as "he" is read to include both men and women and the word "permanent" is read to mean physical presence with intent to remain for a time. The court affirmed injunctive relief and ruled that the fourteenth amendment does not permit the state to discriminate against students by denying them the right to vote or by subjecting them to more rigorous registration requirements than are generally applied.[276]

In Washington, female student athletes and coaches brought sex discrimination action under the state's Equal Rights Amendment[277] against a state university. The court ruled in favor of the plaintiffs and awarded damages, injunctive relief, attorney's fees, and costs. The

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271. North v. State, 400 N.W.2d 566 (Iowa 1987).
272. Meza v. Lee, 669 F. Supp. 325 (D. Nev. 1987).
273. State v. Sturgeon 730 P.2d 93 (Wash. Ct. App. 1986).
274. Taylor v. Angarano, 652 F. Supp. 827 (S.D.N.Y. 1986).
275. *See* The Yearbook of School Law 1986 at 264, Williams v. Salerno, 622 F. Supp. 1271 (S.D.N.Y. 1985).
276. Williams v. Salerno, 792 F.2d 323 (2d Cir. 1986).
277. West RCWA §§ 49.60.010.

plaintiffs appealed since the damage award did not include the football program in calculations for participation opportunities, scholarships, and distribution of nonrevenue funds. The appellate court held that excluding football is prohibited, but that sports generated revenue did not come under the acts.[278]

In a case involving city zoning laws, students appealed their conviction for violating a zoning ordinance which limited occupancy of single family dwellings. The court ruled that the occupancy ordinance did not deprive students of property without due process under the state constitution. However, the students could not receive cumulative fines or penalties for a single, but continuing, violation of the zoning ordinance.[279]

LIABILITY

Personal Injury

The Colorado Supreme Court overturned a case having significance for college and university liability. A lower court had ruled that the university was liable for an accident which rendered a student a quadraplegic. The accident occurred on a trampoline located on property leased by the school to a fraternity.[280] Citing the demise of *in loco parentis* the court on appeal reversed, finding that the university's duty did not go beyond reasonable maintenance of the facility to a duty to protect the student from taking unreasonable actions.[281] In a related case, a state court found that a private university was not liable for injury during a prank by the fraternity.[282]

In another case, the circuit court found that the district court[283] too narrowly defined the provisions of liability for serving alcohol to minors. The court held that the "accomplice" to the crime of consumption of alcoholic beverages by a minor must meet two criteria to establish civil liability.[284] First, they must intend to promote or facilitate the consumption; and second, they must aid or have agreed to aid in the minor's consumption.[285] In a related case, the court found that neither the national fraternity nor its local chapter was liable for the death of a

278. Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987).
279. People v. Multari, 517 N.Y.S.2d 374 (App. Div. 1987).
280. *See* The Yearbook of School Law 1986 at 194, Whitlock v. University of Denver, 721 P.2d 1072 (Colo. Ct. App. 1985).
281. University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987).
282. Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987).
283. *See* The Yearbook of School Law 1987 at 270, Fassett v. Poch, 625 F. Supp. 324 (E.D. Pa. 1985).
284. Fassett v. Delta Kappa Epsilon, 807 F.2d 1150 (3d Cir. 1986).
285. *Id.* at 1161.

member resulting from overconsumption by failing to establish a policy for underage drinking in the chapter house.[286]

In university sponsored activities, plaintiff's have prevailed against the institution in several cases. A student, injured while participating in a sack race using plastic bags during a physical education class, was awarded damages.[287] Additionally, a cheerleader who shattered an elbow during practice had not removed institutional liability by participating in a voluntary activity.[288] However, an award was denied to a student who voluntarily participated in a dive[289] since the injury could not have been foreseen. An institution was not found liable for student injuries during recreational sports[290] or injuries that occurred while sledding on a dining room tray.[291] The university was not held liable when a member of its basketball team punched and injured an opponent during a game.[292] Claims in the death of a football player who collapsed during practice are still pending.[293]

Several defamation suits were before the courts. In New York, the court found that the academic vice president's referral to the plaintiff as a "clown" because of his offer challenging anyone in the university to out teach him, was not defamatory in the context it was spoken.[294] In another suit, the court ruled that the insurance company could not intervene prior to an award of damages by the jury.[295]

The courts refused to hold the institution liable in a pedestrian's fall on campus[296] or in the shooting deaths of people in a university hospital emergency room.[297] However, a private institution was held liable for damage done by water expelled onto a homeowner's land through a storm sewer originating in the institution's parking lot.[298]

Worker's Compensation

In one case, the court found that the sole remedy for a cleaning worker who was injured on the job was with worker's compensation

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286. Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547 (Mo. 1987).
287. Yarbrough v. City Univ. of N.Y., 520 N.Y.S.2d 518 (Ct. Cl. 1987).
288. Kirk v. Washington State Univ., 746 P.2d 285 (Wash. 1987).
289. Whitlock v. Duke Univ., 829 F.2d 1340 (4th Cir. 1987), *aff'g, see* The Yearbook of School Law 1987 at 269, 637 F. Supp. 1463 (M.D.N.C. 1986).
290. Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987).
291. Pizzola v. State, 515 N.Y.S.2d 129 (App. Div. 1987).
292. Townsend v. State, 237 Cal. Rptr. 145 (Ct. App. 1987).
293. Sorey v. Kellett, 673 F. Supp. 817 (S.D. Miss. 1987).
294. Depuy v. St. John Fisher College, 514 N.Y.S.2d 286 (App. Div. 1987).
295. Employers Ins. of Wausau v. Lavender, 506 So. 2d 1166 (Fla. Dist. Ct. App. 1987).
296. McIlrath v. College of St. Catherine, 399 N.W.2d 173 (Minn. Ct. App. 1987).
297. Beck v. Kansas Adult Auth., 735 P.2d 222 (Kan. 1987).
298. Jacobs v. Pine Manor College, 504 N.E.2d 639 (Mass. 1987).

since he was a special employee of the institution.[299] A part-time soccer coach was found to be employed for instructional purposes, not as a professional athlete, and was qualified for compensation.[300] However, in another case, the court held that the mental disability and stress allegedly produced by being a basketball coach and resulting in an attempted suicide was not covered by the state's compensation laws.[301]

In Texas, the court found that an employee who injured her back while carrying boxes in an office move was covered under the Worker's Compensation Act.[302] A cabinet maker whose back injury was related to tasks on the job, received a compensation award.[303] However, an employee presenting a paper at a conference did not receive benefits from an injury received while bicycling from the conference to a campsite.[304]

Contracts

Disputes over various contracts between the institution and purveyors were voluminous. Contracts involving catering services saw a dispute over termination of the contract[305] and a cater's breach of contract for failing to provide liability insurance.[306] In another case, the institution was successful in the recovery of real estate taxes mistakenly paid after the property was sold.[307] In Alabama, the court found that the removal of the signature page while a will was in the possession of the testator negated the will.[308] An attorney's legal fees were not due from the college when he knew he would be called as a key witness in the case against the college.[309]

A number of cases involved contracts where the work or materials were considered to be defective.[310] A student failed in a breach of contract suit because he knew at the time of application for a masters degree that there was no guarantee that the application for a joint

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299. Cameli v. Pace Univ., 516 N.Y.S 2d 228 (App. Div. 1987).
300. *In re* Curto, 517 N.Y.S.2d 107 (App. Div. 1987).
301. Lather v. Huron College, 413 N.W.2d 369 (S.D. 1987).
302. Panola Junior College v. Estate of Thompson, 727 S.W.2d 677 (Tex. Ct. App. 1987).
303. Specialty Cabinet Co., Inc. v. Montoya, 734 P.2d 437 (Utah 1986).
304. Virginia Polytechnic Inst. and State Univ. v. Wood, 360 S.E.2d 376 (Va. Ct. App. 1987).
305. *In re* Shamrock Serv., Inc., 514 So. 2d 921 (Ala. 1987).
306. Roblee v. Corning Community College, 521 N.Y.S.2d 861 (App. Div. 1987).
307. Case Western Reserve Univ. v. Friedman, 515 N.E.2d 1004 (Ohio Ct. App. 1986).
308. Board of Trustees of the Univ. of Ala. v. Calhoun, 514 So. 2d 895 (Ala. 1987).
309. Brill v. Friends World College, 520 N.Y.S.2d 160 (App. Div. 1987).
310. Brandt v. Schal Assoc., Inc., 664 F. Supp. 1193 (N.D. Ill. 1987); Brigham Young Univ. v. Paulsen Constr. Co., 744 P.2d 1370 (Utah 1987); Board of Trustees Santa Fe Community College v. Caudill Rowlett Scott, Inc., 513 So. 2d 206 (Fla. Dist. Ct. App. 1987); City Univ. of N.Y. v. Finalco, Inc., 514 N.Y.S.2d 244 (App. Div. 1987); South Dakota Bldg. Auth. v. Geiger-Berger Assoc., 414 N.W.2d 15 (S.D. 1987).

degree would be approved.[311] In another case the court ruled that wages paid to the installers of a phone system in existing conduits, or conduits installed by the university, were properly set at the rate for telecommunication installation as opposed to the construction rate.[312] The awarding of contracts from bids were also disputed.[313]

A number of cases involved leases. In one case, the court found that a manager of a property was entitled to his commission in the renegotiations of an old lease.[314] The leasee was held liable for improper drilling resulting in damage to the well on an institution's land.[315] In New York, the court found that the contract for insurance did not cover damage awards for employee related injuries.[316]

Educational Malpractice

While there were no educational malpractice cases this year, a related case found that sovereign immunity extended to a resident physician charged with medical malpractice while in training at the university hospital.[317]

Medical Malpractice

In one case, the court dismissed the patient's suit for breach of contract and fiduciary duty in the implantation of a Dalkon Sheild contraceptive device by a university doctor.[318] Several cases involved charges of negligence in the diagnosis of illness or treatment.[319] In a case involving both malpractice and assault charges in the use of psychiatric treatment and the prescription of drugs, the court ruled in favor of the

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311. Voight v. Teachers College, Columbia Univ., 511 N.Y.S.2d 880 (App. Div. 1987).

312. C & C Teletronics, Inc. v. United States W. Information Sys., 414 N.W.2d 758 (Minn. Ct. App. 1987).

313. Insulation Technologies, Inc. v. Board of La. State Univ. and Agricultural and Mechanical College, 504 So. 2d 895 (La. Ct. App. 1987); A-Line Equip. v. Lower Columbia College, 741 P.2d 1057 (Wash. Ct. App. 1987); G.M. McGrossin, Inc. v. West Virginia Bd. of Regents, 355 S.E.2d 32 (W. Va. 1987).

314. Board of Regents of Univ. of Ga. v. A.B. & E., Inc., 357 S.E.2d 100 (Ga. Ct. App. 1987).

315. State Industrial Comm'n v. Harlan, 413 N.W.2d 355 (N.D. 1987); Pen-Nor, Inc. v. Oregon Dep't Higher Educ., 734 P.2d 395 (Or. Ct. App. 1987); Robinson v. City College of Chicago, 656 F. Supp. 555 (N.D. Ill. 1987).

316. Brooklyn Law School v. Aetna Casualty & Surety Co., 661 F. Supp. 445 (E.D.N.Y. 1987).

317. DeRosa v. Shands Teaching Hosp. & Clinics, 504 So. 2d 1313 (Fla. Dist. Ct. App. 1987).

318. Beh v. Ostergard, 657 F. Supp. 173 (D.N.M. 1987).

319. Pratt v. University of Minn. Affiliated Hosp. & Clinics, 403 N.W.2d 865 (Minn. Ct. App. 1987); Arnson v. Superior Court, 236 Cal. Rptr. 347 (Ct. App. 1987).

defendant, reasoning that other medical opinions negated the presumption of reliance on the defendant.[320]

Negligence

The lead off case involves a student who suffered injuries from heavy drinking during a fraternity initiation ceremony.[321] The student was forced to drink a pitcher of beer, part of an eight ounce bottle of whiskey and several drinks at a tavern. Approximately fourteen or fifteen hours after passing out, the student had a blood/alcohol content of .25 and subsequently was diagnosed as having a partial disability from neurological damage which hampered arm and hand motions. On appeal the court found that the fraternity had a duty to refrain from requiring initiates to participate in a dangerous act of drinking after intoxicated. The breach of duty gave rise to a valid claim under common law negligence. In another case involving alcohol, a student who had consumed alcohol while at a football game was found negligent when he was injured after he vaulted over a wall and fell thirty feet to a stairway below.[322] The university was not found negligent because it had a policy prohibiting consumption at the stadium but had not enforced it in the case of the plaintiff.

Students were also involved in other negligence claims against institutions. In California, a widow brought a negligence claim against the institution in the drowning of her husband during the final dive in a scuba diving class.[323] The appeals court, reversing the lower court, ruled that the waiver signed by the student did not include negligence on the part of the college. A Florida court reversed and remanded a case where a student drowned at a university owned lake after renting a canoe and a life jacket.[324] The appeals court found a valid common law duty which was breached. No instruction or warnings were given nor was a life guard on duty at the dock where the canoes were dispensed, but those precautions were taken at the sailboat dock. However, an institution was not found negligent in the injuries received by a child who was injured when he pushed on and shattered a glass panel in a storm door at the entrance to his campus apartment.[325] The plaintiff alleged that the university was negligent because they replaced the screen, which had been repeatedly pushed in by his children, with a glass panel. The court

320. Lackey v. Bressler, 358 S.E.2d 560 (N.C. Ct. App. 1987).
321. Quinn v. Sigma Rho Chapter of Beta Theata Pi Fraternity, 507 N.E.2d 1193 (Ill. App. Ct. 1987).
322. Allen v. Rutgers State Univ., 523 A.2d 262 (N.J. Super. Ct. App. 1987).
323. Scroggs v. Coast Community College Dist., 239 Cal. Rptr. 916 (Ct. App. 1987).
324. Brown v. Florida State Bd. of Regents, 513 So. 2d 184 (Fla. Dist. Ct. App. 1987).
325. Bolkhir v. North Carolina State Univ., 355 S.E.2d 786 (N.C. Ct. App. 1987).

found negligence could only be shown if there was proof that the glass panel was defective since the glass panel was standard for those types of storm doors.

Several cases involved negligence brought by those outside the institution. In an Alaska case remanded on appeal, the contractor claimed negligence resulting in economic loss when the university failed to adequately brace a trench where the contractor was to work.[326] The loss claim is for time spent away from his company when employees were injured when the trench collapsed. In another case, the court reversed and remanded a summary judgment in favor of the university in the negligence claim of a pedestrian injured when she was pinned against a wall by an auto and the wall collapsed.[327] But a negligence claim over a one inch rise in the concrete at the entrance of a building alleged to be the cause of a fall was dismissed based on the concept of plain view.[328]

Indemnification

In North Carolina, the court found that the insurance policy allowed for coverage under a malicious prosecution claim, but public policy prohibited coverage under punitive damages claims arising out of intentional torts.[329] The case involved the employer obtaining a restraining order against an employee in a dispute over control of a "thermotron" received as a gift from Japan.

In another case, the insurance company brought a third party action against the university and a contractor to recover damages it paid out as part of a settlement. The insurance company claimed that the university pilot was negligent in the crash of the helicopter. The court found the claim barred by the eleventh amendment.[330]

Antitrust

The Supreme Court refused to hear a case that the circuit court had affirmed.[331] The case involved the court's finding that the failure of the American Chiropractic Association's denial of accreditation of a college of "straight chiropractics" did not violate antitrust statutes.

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326. Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987).

327. Teider v. Little, 502 So. 2d 923 (Fla. Dist. Ct. App. 1987).

328. Emory Univ. v. Duncan, 355 S.E.2d 446 (Ga. Ct. App. 1987).

329. St. Paul Mercury Ins. Co. v. Duke Univ., 670 F. Supp. 630 (M.D.N.C. 1987).

330. Firemens Fund Ins. Co. v. Bell Helicopter Textron, 667 F. Supp. 583 (E.D. Tenn. 1987).

331. Sherman College of Straight Chiropractic v. American Chiropractic Ass'n, 654 F. Supp. 716 (N.D. Ga. 1986), *aff'd.*, 813 F.2d 349 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 160 (1987).

Patent and Trade Mark

In a dispute over the filing date of a patent, a university professor lost an appeal of a decision by the United States Patent and Trademark Office which awarded priority of invention to a Japanese inventor.[332] A Minnesota court, affirming a lower court,[333] found no basis for error in the courts original decision granting the licensor, the university, an award of royalties and fees from the licensee under a patent licensing agreement.[334] In a case where the national fraternity prevailed in a trademark claim against a local former chapter of the fraternity, the court denied an award of attorney's fees where there was no intent to violate the trade mark or become involved in deception.[335]

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332. Griffith v. Kanamaru, 816 F.2d 624 (Fed. Cir. 1987).

333. *See* The Yearbook of School Law 1987 at 271, Regents of the Univ. of Minn. v. Medical, Inc., 382 N.W.2d 201 (Minn. Ct. App. 1986), *cert. denied*, 382 N.W.2d 201 (Minn. Ct. App. 1986), *cert. denied*, 107 S. Ct. 307 (1986).

334. Regents of the Univ. of Minn. v. Medical Inc., 405 N.W.2d 474 (Minn. Ct. App. 1987), *cert denied*, 108 S. Ct. 495 (1987).

335. Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity, 659 F. Supp. 117 (D.N.H. 1987).

TABLE OF CASES

510 Joint Venture v. Board of Assessors, 217
A.A. v. Cooperman, 120, 121
A.H. Belo Corp. v. Southern Methodist Univ., 196
A.W. v. Northwest R-1 School Dist., 115, 116
A-Line Equip. v. Lower Columbia College, 263
AASE v. State, 224
Acrey v. Acrey, 251
Adams v. Bennett, 229
Adams v. Richardson, 229
Agostine v. School Dist. of Philadelphia, 129
Aguilar v. Felton, 74, 109
Aguillard v. Edwards, 84
Aguillard v. Treen, 84
Ahmed v. University of Toledo, 253
Al-Khazraji v. St. Francis College, 237
Alabama State Tenure Comm'n v. Birmingham Bd. of Educ., 21
Alabama State Tenure Comm'n v. Conecuh County Bd. of Educ., 17
Albers v. Community Consol. No. 204 School, 141
Albert v. Carovano, 255
Alexopulos v. San Francisco Unified School Dist., 128
Allen v. Rutgers State Univ., 189, 264
Alliger, *In re*, 251
Altoona Area Vocational Technical School v. Pollard, 25
Amacher v. Clarion Area School Dist., 152
Amelia County School Bd. v. Virginia Bd. of Educ., 128, 129
Americans United for Separation of Church and State v. School Dist. of the City of Grand Rapids, 88
Anable v. Ford, 82, 83
Anderson v. Board of Coop. Educ. Servs., 33
Anderson v. University of Wis., 248
Anderson County Bd. of Educ. v. National Gypsum Co., 157
Andres v. Alpha Kappa Lambda Fraternity, 261
Andrews v. Division of Retirement, 247
Andrews v. Education Ass'n of Cheshire, 40
Anthon-Oto Community School Dist. v. PERB, 41
Antkowiak v. Ambach, 118, 120
Arizona Bd. of Regents v. State, 225
Arkansas Rural Medical Practice Student Loan and Scholarship Bd. v. Luter, 251
Arko v. United States Air Force Reserve Officer Training Program, 249
Arnson v. Superior Court, 263
Ashley v. University of Louisville, 49, 238
Association of Pa. State College and Univ. Faculties v. Pennsylvania Labor Relations Bd., 57, 243
Association for Retarded Citizens of Alabama, Inc. v. Teague, 114
Atascadero State Hosp. v. Scanlon, 118
Ausmus v. Board of Educ., 144
Azzari v. Commonwealth Unemployment Compensation Bd. of Review, 251

B.C. v. Board of Educ., Cumberland Regional School Dist., 184
Bagg v. University of Tex. Medical Center, 57
Baker v. Board of West Irondequoit Cent. School Dist., 44
Baker v. Lafayette College, 239
Ballinger v. North Carolina Extension Serv., 231
Bania v. New York State Employment Sys., 246
Barbara R. v. Torozzi, 126
Barbin v. State, 155
Barcheski v. Board of Educ., 20
Barile v. University of Va., 187
Barnes v. Patrick Henry State Junior College, 246
Barwacz v. Michigan Dep't of Educ., 118, 122, 129
Baxter v. Bowman Gray School of Medicine, 248
Bay City Educ. Ass'n v. Bay City Pub. Schools, 45
Bayport-Blue Point School Dist. v. State Div. of Human Rights, 9
Bazemore v. Friday, 233
Beauford v. Father Flanagan's Boys' Home, 9, 137
Beaver v. Ortenzi, 255
Beck v. Kansas Adult Auth., 261
Beckett v. Clinton Prairie School Corp., 188
Bego v. Gordon, 152
Beh v. Ostergard, 263
Bell v. Trustees of Purdue Univ., 234
Bell v. New Jersey, 209
Bender v. Williamsport Area School Dist., 90
Bennett v. State Bar of Nev., 250
Bensalem Township School Dist. v. Commonwealth, 207

Beranek v. Joint Indep. School Dist. No. 287, 23
Beseke v. Garden Center, Inc., 150
Beste v. Independent School Dist. No. 697, 27
Beth Rochel Seminary v. Bennett, 250
Bevin H. v. Wright, 119
Bevsek v. Huerfano School Dist. RE-1, 26
Bible Speaks, *In re*, 250
Biggiam v. Board of Trustees, 61, 241
Blackwell v. United States Dep't of Treasury, 134
Blair v. Washington State Univ., 183, 260
Blum v. Yaretsky, 191
Board of Educ., Cincinnati v. Department of HEW, 102
Board of Educ., Commack v. Port Jefferson Union Free School Dist., 69
Board of Educ. of City of Plainfield v. Cooperman, 132
Board of Educ., Monroe-Woodbury Cent. School Dist. v. Wieder, 109
Board of Educ., Peoria v. Illinois State Bd. of Educ., 102
Board of Educ. v. Allen, 74
Board of Educ. v. Ambach, 50
Board of Educ. v. Bridgeport Educ. Ass'n, 33
Board of Educ. v. Brisbois, 61
Board of Educ. v. Compton, 58
Board of Educ. v. Connecticut Bd. of Labor Relations, 58
Board of Educ. v. Illinois State Board of Educ., 23
Board of Educ. v. Kushner, 22
Board of Educ. v. McCollum, 19
Board of Educ. v. Prince George's County Educators Ass'n, 51
Board of Educ. v. Rockford Educ. Ass'n, 49, 50
Board of Educ. v. Sullivan, 23
Board of Educ. v. Warren Township High School Fed'n of Teachers, 48
Board of Educ. v. Wood, 21
Board of Educ. v. Yonkers Fed'n of Teachers, 54
Board of Regents of Univ. of Ga. v. A. B. & E., Inc., 263
Board of School Comm'rs of Mobile County v. Jaffree, 85
Board of Trustees v. Federation of College Clerical and Technical Personnel, 50
Board of Trustees of Community College Dist. No. 508 v. Burris, 250
Board of Trustees of Community College Dist. 508 v. Federation of College Clerical and Technical Personnel, Local 1708, 242
Board of Trustees of Pascagoula Mun. Separate School Dist. v. Doe, 122, 128
Board of Trustees of State Institutions of Higher Learning v. Johnson, 252
Board of Trustees of State Institutions of Higher Learning v. Van Slyke, 226
Board of Trustees of the Univ. of Ala. v. Calhoun, 262
Board of Trustees of Univ. Sys., *In re*, 52, 239
Board of Trustees Santa Fe Community College v. Caudill Rowlett Scott, Inc., 262
Bolkhir v. North Carolina State Univ., 264
Bollenbach v. Board of Educ. of Monroe-Woodbury, 79
Bollenbach v. Monroe-Woodbury Cent. School Dist., 59
Bonacci v. Quinones, 14, 15
Booth v. Argenbright, 20
Borman v. Gorham-Fayette Bd. of Educ., 31
Boston Univ. Chapter, Am. Ass'n of Univ. Professors v. National Labor Relations Bd., 41
Botti v. Southwest Butler County School Dist., 15
Boudreaux v. Helena-West Helena School Dist., 5
Bradley v. Bahles, 102
Bradley v. Richmond School Bd., 130
Braintree Baptist Temple v. Holbrook Pub. Schools, 72, 73
Brands v. Sheldon Community School, 179
Brandt v. Board of Coop. Educ. Servs., 15, 176
Brandt v. Schal Assoc., Inc., 262
Braun v. Board of Educ., 145
Brentwood Union Free School Dist. v. State, 205
Brigham Young Univ. v. Paulsen Constr. Co., 262
Brill v. Friends World College, 262
Brindisi v. University Hosp., 228
Britt v. North Carolina State Bd. of Educ., 200, 201
Britton v. South Bend Community School Corp., 5
Brobst v. Columbus Servs. Int'l, 234
Brooklyn Law School v. Aetna Casualty & Surety Co., 263
Brooks v. St. Tammany Parish School Bd., 142
Brown, *In re*, 252

Brown v. Board of Educ., Bessemer, 106
Brown v. Board of Educ. of Topeka, 99
Brown v. Board of Regents of Univ. of Neb., 253
Brown v. Civil Serv. Comm'n, 24
Brown v. Florida State Bd. of Regents, 264
Brumbach v. Rensselaer Polytechnic Inst., 239
Bruner v. University of S. Miss., 192, 245
Brunner v. New York State Higher Educ. Serv., 251
Bucks County Pub. Schools v. Department of Educ., 209
Buddell v. Board of Trustees of State Retirement Sys., 247
Burch v. Barker, 91
Burk v. Unified School Dist. No. 329, 14, 15, 170
Burlington School Comm. v. Department of Educ., 116, 122, 129
Burpee v. Manchester School Dist., 123, 124
Burton v. Hardin, 175
Buys v. Independent School Dist. No. 891, 29
Bynum v. Michigan State Univ., 231
Byrd v. Livingston Indep. School Dist., 68
Bystrom v. Fridley High School, 90

C & C Teletronics, Inc. v. United States W. Information Sys., 263
Carbaga Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 32
Calico Rock School Dist. No. 50 v. Speak, 26
California Dep't of Educ. v. Bennett, 210
California Teachers' Ass'n v. Governing Bd. of Garvey School Dist., 32
Cameli v. Page Univ., 262
Camp v. Sarratt, 151
Campbell v. Montgomery County Bd. of Educ., 158
Campbell County, *In re*, 224
Canale v. Honig, 207
Canisius College v. United States, 246
Cannon v. Loyola Univ. of Chicago, 234
Canon-McMillan School Dist. v. Bioni, 154
Capello v. District of Columbia Bd. of Educ., 124, 125, 126
Capodilupo v. Board of Educ., 27
Carangelo v. Ambach, 19
Carl v. Banks Engineering Co., 154
Carlan v. Lawrence Union Free School Dist. Bd. of Educ., 19
Carley v. Arizona Bd. of Regents, 236
Carlson v. North Dearborn Heights Bd. of Educ., 7, 14, 39, 43
Carpenter v. Board of Educ., 35
Carroll v. City of Dothan Bd. of Educ., 93
Carter, *In re*, 251
Carter v. Bennett, 136
Carter v. Tisch, 137
Cascade Bargaining Council v. Jefferson County School Dist. No. 509-J, 55
Case Western Reserve Univ. v. Friedman, 262
Cason v. Cook, 80
Castaneda v. Pickard, 78
Catasauqua Area School Dist. v. Raymark Industries Inc., 167
Catlin v. Ambach, 129
Cawthon v. Waco Fire & Casualty Ins. Co., 146
Center State Bank v. Dana, Larson, Ropubal, 157
Central Lakes Educ. Ass'n v. Independent School Dist. No. 743, 64
Champion v. Kenowa Hills Pub. Schools, 65
Charles, *In re*, 72
Chee Owens v. Leavitts Freight Serv., 147
Chester Upland School Dist. v. Pennsylvania Labor Relations Bd., 41
Chicago Teachers' Union v. Hudson, 40, 64
Childers v. Morgan County Bd. of Educ., 8
Chiriboga v. Saldana, 243
City of El Paso v. El Paso College Dist., 213
City of El Paso v. El Paso Community College, 225
City of Morgantown v. West Virginia Bd. of Regents, 195, 227
City of Parma v. Manning, 254
City of Riverside v. Rivera, 127
City School Dist. of Peekskill v. State, 205
City Univ. of N.Y. v. Finalco, Inc., 262
Clairborne County Bd. of Educ. v. Martin, 26
Clapsaddle v. Bethel Park School Dist., 28, 49
Clark v. Dallas Indep. School Dist., 88
Cleveland Bd. of Educ. v. Loudermill, 14
Cleveland, *In re*, 252
Clissuras v. City of N.Y., 43
Cochran v. District of Columbia, 112
Codd v. Velger, 177
Cohen v. Wales, 145
Cole v. Greenfield-Central Community Schools, 121, 171

Coleman v. Wagner College, 255
Coleman v. Wayne State Univ., 233
Combs v. Board of Educ., 16, 17
Commonwealth v. State School and Hospital Fed'n of Teachers, 51
Community College Dist. 508 v. McKinley, 241
Comuntzis v. Pinellas County School Bd., 142
Connick v. Meyers, 10
Conway v. Hampshire County Bd. of Educ., 21
Cook v. School Dist. UH3J, 189
Cooper v. Alabama State Tenure Comm'n, 35
Cormier v. Lafayette Parish School Bd., 163
Cornelius v. NAACP Legal Defense and Educ. Fund, 88
Cornell Univ. v. Bagnardi, 227
Cortes v. Western Montgomery County Vocational-Technical School, 17
Cosgrove v. Lansing Bd. of Educ., 44
Counsel v. Dow, 123, 125
County of Rockland v. Rockland County Community College Fed'n of Teachers, 47, 242
Courtney, *In re*, 251
Covert v. Bensalem Township School Dist., 16, 21
Covington v. Southern Ill. Univ., 234
Cowdery v. Board of Educ., 24
Crancer v. Board of Regents of Univ. of Mich., 249
Crillo v. Board of Educ., 22
Crook v. Baker, 257
Crowley v. Board of Educ., 54
Crowman v. Manhattan Community College, 231
Cruz v. Fundacion Educativa Ana G. Mendez, Inc., 62
Crystal City Indep. School Dist. v. Bank of Dallas, 220
Cuddihy v. Wayne State Univ. Bd. of Governors, 257
Cula Vista City School Dist. v. Bennett, 211, 212
Cupelli v. School Dist. of Allentown, 216
Curtis v. State, 187
Curto, *In re*, 194, 262

Dallap v. Sharon City School Dist., 29
Daniels v. Board of Educ., 5
Davenport v. Rockbridge County School Bd., 114
David D. v. Dartmouth School Comm., 118
David "JJ", *In re*, 110
Davis v. Halpern, 249
Davis v. United State Postal Serv., 137
de Oliveira v. State Bd. of Educ., 18
Dean v. Board of Educ., 157
DeFalco v. Deer Lake School Dist., 130, 174
DeKalb County Eastern Community School Dist. v. Dekalb County Eastern Educ. Ass'n, 42
Delaney v. Alaska Airlines, 161
Denny v. Westfield State College, 232
Denver Post Corp. v. University of Colo., 226
Depuy v. St. John Fisher College, 261
DeRosa v. City of New York, 150
DeRosa v. Shands Teaching Hosp. & Clinic, 263
Desimone v. Skidmore College, 237
DeSoto County School Bd. v. Garrett, 24
DeSoto County Teachers' Ass'n v. District School Bd., 60
Detsel v. Board of Educ. of Auburn Enlarged City School Dist., 119
DeVico v. Roman Catholic Diocese, 32
Devries v. Fairfax County School Bd., 113
Dexler v. Tisch, 136
DiCerbo v. Raab, 148
Dickens v. Johnson County Bd. of Educ., 97, 98
Dillon v. Board of Educ., 33
Dinman, *In re*, 235
Dionsio v. Board of Educ., 27
District of Columbia v. Doe, 143
Dixon v. Rutgers, 237
Dixon v. Sanderson, 5
Dodds v. Simpson, 131
Doe v. Anrig, 111, 120
Doe v. Belleville Pub. School Dist. No. 118, 110, 114
Doe v. Renfrow, 83
Doe v. Rockingham County School Bd., 112, 113, 121
Doherty v. Southern College of Optometry, 132, 235
Dong v. Board of Trustees of Leland Stanford Junior Univ., 245
Donohue v. Copaigue Union Free School Dist., 150
Donovan v. Local No. 6, Washington Teachers' Union, 65
Dorsch v. Butler Area School Dist., 154
Dougherty County Bd. of Educ. v. Lundy, 161
Dowell v. School Bd. of Okla. City, 98
Drew P. v. Clarke County School Dist., 117

Duax v. Kern Community College Dist., 241
Duchess Community College v. Regan, 250
Dugan v. Ball State Univ., 231
D'Ulisse-Cupo v. Board of Directors, 166
Dumain v. Carey, 205
Duran v. Albuquerque Pub. Schools, 163
Duval County School Bd. v. State, 33
Dyer v. Investors Life Ins. Co. of N. Am., 247

Eberhart v. Morris Brown College, 187
Edward B. v. Brunelle, 113, 118, 128, 131
Edward B. v. Paul, 114
Edwards v. Aguillard, 84
EEOC v. Board of Governors of State Colleges and Univs., 59, 234
EEOC v. Franklin and Marshall, 235
EEOC v. Madison Community Unit School Dist. No. 12, 6, 194
Eggleston v. Ellis, 247
Eisbruck v. New York State Educ. Dep't 520, 251
Eiseman v. State, 248
Eivins v. Adventist Health Sys./Eastern & Middle Am., 138
Elliot v. Drayton Pub. School Dist., 213
Ellis v. Ambach, 20
Ellis v. Owens, 244
Ellis-Adams v. Whitfield City Bd. of Educ., 23
Elmlinger v. Grand Island Bd. of Educ., 153
Emory Univ. v. Duncan, 265
Employers Ins. of Wausau v. Lavender, 261
Enlarged City School Dist. v. Troy Teachers' Ass'n, 49
Envall v. Independent School Dist. No. 704, 48
Epperson v. Arkansas, 84
Equi v. Board of Educ., 19
Esther C. v. Ambach, 126
Evans v. Independent School Dist. No. 281, 28

Faculty Ass'n of Suffolk County Community College v. Public Employment Relations Bd., 63, 242
Fadler v. Illinois State Bd. of Educ., 20
Fair School Finance Council of Okla., Inc. v. State, 201, 202
Fairbanks North Star Borough School Dist. v. Crider, 163
Fassett v. Poch, 260
Fassett v. Delta Kappa Epsilon, 260
Fazzolari v. Portland School Dist., 149
Fellowship Baptist Church v. Benton, 71, 72
Fennell v. John J. Nesbitt, Inc., 156
Ferguson v. Abrams, 168
Ferrario v. Board of Educ., 17
Ferrell v. Southern Farm Bureau Casualty Ins. Co., 159
Field v. Clark Univ., 238
Firemens Fund Ins. Co., v. Bell Helicopter Textron, 265
Fiscus v. Board of School Trustees, 21
Fisher v. Bowen, 252
Florida High School Activities Ass'n, Inc. v. Temple Baptist Church, Inc., 181
Foderaro v. School Dist. of Philadelphia, 19
Foss v. City of Chicago, 137, 138
Fowler v. Board of Educ., 10, 19
Fox v. Board of Trustees of State Univ. of N.Y., 254
Frakes v. Martin, 148
Fraser v. Board of Educ., 32
Frazer School Dist. No. 2 v. Flynn, 69
Frazier v. State, 221
Frazier [sic] School Dist. No. 2 v. Forsness, 69
Fremont RE-1 School Dist. v. Jacobs, 23
Friedland v. Ambach, 164

G.C. v. Coler, 131
G.D.L. Plaza v. Council Rock School Dist., 217
G.M. McGrossin, Inc. v. West Virginia Bd. of Regents, 263
Gano v. School Dist. No. 411 of Twin Falls, 91
Garcia v. Miera, 96, 171
Garland Indep. School Dist. v. Wilks, 117, 121, 125
Garrick B. v. Curwensville Area School Dist., 116
Gary Teachers Union Local No. 4 v. Gary Community School Corp., 55
Gay and Lesbian Students Ass'n v. Gohn, 255
George Washington Univ. Medical Center v. District of Columbia Bd. of Appeals and Review, 226
Gerrard v. United States Office of Educ., 252
Gilyard v. South Carolina Dep't of Youth Servs., 28
Ginocchi v. Burrel School Dist., 29
Gioe v. Board of Educ., 17
Giordano v. Ambach, 28
Gomez v. Illinois Bd. of Educ., 77, 78
Gordon v. Board of Educ., 140
Goss v. Lopez, 93, 121

Gottlieb v. Tulane Univ. of La., 239
Goudeau v. Independent School Dist. No. 37, 15
Graf v. Frame, 225
Grand Rapids School Dist v. Ball, 80
Gray v. University of Ark., 193, 245
Graziano v. Board of Amherst Exempted Village School Dist., 21
Greater Nanticoke Area School Dist. v. Area Educ. Ass'n, 63
Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 51
Green River Community College Dist. No. 10 v. Higher Educ. Personnel Bd., 52, 242
Greene County Bd. of Educ. v. Perry, 37
Gregoire v. Centennial School Dist., 87
Gregory K. v. Longview School Dist., 112, 117, 126
Griffin High School v. Illinois High School Ass'n, 181
Griffith v. Kanamaru, 266
Grim v. West Chester Area School Dist., 33
Grimsley v. Board of Trustees, 14
Grostick v. Ellsworth, 166
Grove City College v. Bell, 182, 229
Guild of Admin. Officers of Suffolk County Community College v. County of Suffolk, 242
Guimarales, *In re*, 62
Gutierrez v. Dallas Indep. School Dist., 163

Haffer v. Temple Univ., 183, 232
Haggard v. Board of Regents of Univ. Sys. of Ga., 197
Hall v. Tauney, 96
Hall v. Regents of the Univ. of N.M., 228
Hamer v. Brown, 237
Hammond v. Auburn Univ., 258
Hankins v. Temple Univ., 258
Hanley v. Hornbeck, 143
Hansen v. Board of Educ., 22
Harlow v. Fitzgerald, 11
Harper v. Edgewood Bd. of Educ., 92
Harrell v. University of Montevallo, 232
Hartford Principals' and Supervisors' Ass'n v. Shedd, 58
Hatcher v. Board of Pub. Educ., 12, 15, 16, 17
Hawkins v. NCAA, 185
Hayes v. Unified School Dist. No. 377, 114, 121
Hein v. Board of Educ., 26
Hensley v. Eckerhart, 126
Herrold v. State School for Deaf and Blind, 19
Heyer v. North East Indep. School Dist., 155
Hicks v. Putnam County School Bd., 161
Hill v. Board of Trustees of Cal. State Univ. Sys., 190, 245
Hill v. Greene County Bd. of Educ., 219
Hill v. Talladge College, 239
Hiller v. Board of Educ. of Brunswick Cent. School Dist., 114
Hillhouse v. Rice School Dist. No. 20, 27
Hineseburg School Dist. v. Vermont NEA, 63
Hitchcock v. Garvin, 155
Hoerger v. Board of Educ., 44, 65
Hoffman v. Board of Educ., 150
Honore v. Douglas, 237
Hoover v. Charlotte-Mecklenburg Bd. of Educ., 159
Hopkins v. Spring Indep. School Dist., 145
Housley v. North Panola Consol. School Dist., 13, 14
Howard v. Board of Educ., 23
Howell v. State, 75
Huber v. Franklin County School Bd. of Trustees, 215
Hudson v. Wilson, 116
Hudson v. Chicago Teachers' Union, 64
Hulet v. Bozeman School Dist. No. 7, 4
Hunter v. Seattle School Dist. No. 1, 117
Hyman v. Green, 144

Ibarbia v. Regents of the Univ. of Cal., 236
Illinois Educational Labor Relations Bd. v. Homer Community Consol. School Dist. No. 208, 57
Illinois v. Bowen, 209
Imbrunone v. Inkster Pub. Schools, 34
Indiana Univ. v. Canganelli, 251
Indiana Civil Rights Comm'n v. Culver Educ. Found., 27
Industrial Indem. Co. v. Beeson, 159
Ingraham v. Wright, 13, 96, 121
Insulation Technologies, Inc. v. Board of La. State Univ. and Agricultural and Mechanical College, 263
Iowa Ass'n of School Bds. v. Iowa Pub. Employment Relations Bd., 57
Irving Indep. School Dist. v. Tatro, 121

J.D., *In re*, 111
J.G. v. Rochester City School Dist. Bd. of Educ., 113, 127
Jackson v. Board of Educ., 168
Jackson, *In re*, 95

Jacobs v. Pine Manor College, 261
Jaffree v. Board of School Comm'rs of Mobile County, 85
Jaffree v. Wallace, 85
Jain v. University of Tenn., 230
Jam v. Independent School Dist., 147
Jansen v. Atiyeh, 225
Jeannette L., *In re*, 75
Jefferson v. Ysleta Indep. School Dist., 97, 174
Jefferson County Schools v. Headrick, 161
Jenkins v. Missouri, 101
Jenkins v. Florida, 117
Jenson v. Joint Indep. School Dist., 32, 61
Jermain v. Board of Regents of Higher Educ., 241
Jersey City Educ. Ass'n, Inc. v. Board of Educ., 51
Jimenez v. Honig, 78
Jimenez-Torres De Panepinto v. Saldana, 243
John v. Louisiana, 230
John R. v. Oakland Unified School Dist., 156
Johnson v. Bozeman School Dist., 3
Johnson v. Clark, 122
Johnson v. Lincoln Christian College, 256
Johnson v. Educational Testing Serv., 248
Johnson County Tenn. v. United States Gypson Co., 157
Jones v. Board of Educ., 17
Jones v. City of Albany, 143
Jones v. Sheridan County School Dist., 157
Jones v. Turlington, 37
Jordi v. Sauk Prairie School Bd., 40
Juneau v. Louisiana Bd. of Elementary and Secondary Educ., 19
Juras v. Aman Collection serv., Inc., 252

Kadrmas v. Dickinson Pub. Schools, 70, 212
Kahn v. Superior Court (Davies), 236
Kalish v. Illinois Educ. Ass'n, 250
Kanaly v. State, 224
Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity, 266
Karasik v. Board of Regents, 225
Karmanos v. Baker, 181
Karp v. University of N.C., 247
Kashani v. Purdue Univ., 257
Katz v. Rockville Centre Free School Dist., 156
Keeler v. Everett Area School Dist., 95, 165
Keller v. Board of Trustees of Coffeyville Community College, 240
Kelso Educ. Ass'n v. Kelso School Dist., 32, 61, 220
Kent County Educ. Ass'n v. Cedar Springs Pub. Schools, 45, 55
Kercado-Melendez v. Aponte-Roque, 12
Kerkam v. District of Columbia Bd. of Educ., 119
Kerns v. Bucklew, 236
Keyes v. School Dist. No. 1, 105
Killen v. Continental Ins. Co., 247
Kimberly M. v. Los Angeles Unified School Dist., 145
Kimble v. Los Angeles City Bd. of Educ., 24
Kimpton v. School Dist. of New Lisbon, 173
King v. Elkins Pub. Schools, 19, 191
Kirk v. Board of Educ., 4, 59
Kirk v. Smith, 162
Kirk v. Washington State Univ., 188, 261
Kitchen v. Chippewa Valley Schools, 6
Kneale v. Cuomo, 206
Kneeland v. NCAA, 195
Knickles v. United Cab Co., Inc., 146
Knowles v. Postmaster Gen., 136
Kohen v. Board of School Comm'rs, 219
Kohl v. Woodhaven Learning Center, 132, 134
Kovats v. Rutgers University, 237
Kozak v. Struth, 144
Krikorian v. Barry, 151
Kristi W. v. Graham Indep. School Dist., 123, 125, 127
Krupp v. Lincoln Univ., 247
Kuhlmeier v. Hazelwood School Dist., 90
Kyriakopoulos v. George Washington Univ., 246

Lackey v. Bressler, 264
Lafayette Cent. School Dist. v. Niagara Mohawk Power, 218
Lake Washington School Dist. No. 414 v. Lake Washington Educ. Ass'n, 51
Lakeland Cent. School Dist. of Shrub Oak v. State Dep't of Educ., 208
Lamb v. Panhandle Community Unit School Dist. No. 2, 93
Lansing Community College v. Lansing Community College Chapter Mich. Ass'n for Higher Educ., 52, 241
Lather v. Huron College, 195, 262
Latimore v. University of N.C. at Charlotte, 238
Lau v. Nichols, 78
Laurel Heights Improvement Ass'n v. University of Cal., 228

Law v. Mandan Pub. School Dist., 26
Leathem v. Research Found. of City Univ. of N.Y., 235
Ledbetter v. Jackson County Bd. of Educ., 23
Lee v. Albemarle County School Bd., 5, 13, 16
Legrand v. Trustees of the Univ. of Ark., 231
Lemon v. Kurtzman, 74, 80
Lew v. Seattle School Dist. No. 1, 31, 49
Lewis v. Harrison School Dist. No. 1, 11
Lewis v. Kelchner, 244
Lexington Herald-Leader Co. v. University of Ky., 226
Libscomb v. State Bd. of Higher Educ., 224
Liddell v. Board of Educ., St. Louis, 100, 101
Lindsey v. Dempsey, 192, 245
Lisanti, *In re*, 251
Littky v. Winchester School Dist., 23
Little Rock School Dist. v. Pulaski County Special School Dist., 30, 103, 104
Local 253, Div. Affiliated with Local 50 v. Illinois Educ. Labor Relations Bd., 42
Local No. 799, Int'l Ass'n of Firefighters AFL-CIO v. Napolitano, 32
Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 134, 136
Lockhart v. Arapahoe County School Dist. No. 6, 10, 18
Lockhart v. Board of Educ., 175
Lodwick v. School Dist. of Palm Beach County, 215
Lohman v. Connecticut Student Loan Found., 251
Lombard v. Board of Educ., 3, 14
Lopez v. Board of Educ., 65
Lopez v. Houston Indep. School Dist., 173
Los Angeles Unified School Dist. v. Public Employment Relations Bd., 41
Loudermill v. Cleveland Bd. of Educ., 16
Lucia Mar Unified School Dist. v. Honig, 208
Luoto v. Long Creek School Dist., 59
Lutz v. Jefferson Parish School Bd., 162
Lyman v. Strasburg, 14

Mabry v. State Bd. for Community Colleges and Occupational Educ., 241
MacPherson v. School Bd., 35
Macquire v. Marquette Univ., 231
Maglio v. NECA-IBEW Welfare Trust Fund, 159
Maher v. Gagne, 88
Makarchuk, *In re*, 252
Manchester Bd. of School Comm., *In re*, 40
Manges v. Freer Indep. School Dist., 216
Maplewood-Richmond Heights School Dist. v. Leachman, 214
Marcotte v. Aroyelles Parish School Bd., 19
Mares v. Santa Fe Pub. Schools, 4
Margolin v. Newman, 43
Mariani v. School Directors of Dist. 107, 31
Marin Piazza v. Aponte-Roque, 12
Marlyn S. v. City of New York, 160
Marsh v. Chambers, 86
Marshall v. Russo, 47
Martin-Trigona v. Board of Trustees of the Univ. of D.C., 231
Maryland Cent. Collection Unit v. University of R.I., 228
Massie v. Persson, 168, 188
Mathern v. Campbell County Children's Center, 123
Matthews v. Harney County School Dist. No. 4, 15
Mattingly v. Sheldon Jackson College, 265
Mauro v. Board of Higher Educ., 230
Maxfield v. Board of Educ., 35
Maxwell v. University of Mich., 244
Mayes v. Board of Review, Ohio Bureau of Employment Servs., 37
Maynard v. Board of Educ. of Wayne County, 29
McCammon v. Los Angeles Unified School Dist., 62
McCollum v. Board of Educ., 85
McConnell v. Howard Univ., 240
McCullar v. Illinois Human Rights Comm'n, 6, 193
McCutcheon v. Chicago Principal's Ass'n, 43
McDonnell Douglas Corp. v. Green, 4
McGowan v. McGowan, 4
McIlrath v. College of St. Catherine, 261
McLoughlin v. Holy Cross High School, 141
McNair v. Cardimone, 120
McPherson v. Public Employment Relations Bd., 56
McQuillen v. Wisconsin Educ. Ass'n Council, 7
Meade v. Mingo County Bd. of Educ., 33
Meade Educ. Ass'n v. Meade School Dist., 52
Medical Univ. of S.C. v. Taylor, 245
Meek v. Pittinger, 74
Meister v. City of New York, 159

Melani v. Board of Higher Educ. of City of N.Y., 4
Mellinger v. Department of Community Affairs, 215
Mellor v. Clancy, 167
Melrose Mun. School Bd. of Educ. v. New Mexico State Bd. of Educ., 21
Memphis Community School Dist. v. Stachura, 12
Merkley v. Palmyra-Macedon Cent. School Dist., 144
Merkwan v. State, 224
Mermer v. Constantine, 176
Merrill v. Southern Methodist Univ., 238
Meyers v. Sabine Parish School Bd., 16
Meza v. Lee, 259
Mieczkowski v. Ithica College, 240
Miller v. Emelson, 5
Miller v. Gibson, 150
Milliken v. Bradley, 106
Milonas v. Williams, 96
Minersville Area School Dist. v. Minersville Area School Serv. Personnel Ass'n, 53
Mississippi High School Activities Ass'n, Inc. v. Farris, 185
Missouri Nat'l Educ. Ass'n v. New Madrid County R-1 Enlarged School Dist., 11
Monroe-Lord v. Hytche, 238
Montez v. South San Antonio Indep. School Dist., 14
Montgomery County Educ. Ass'n v. Board of Educ., 46
Montgomery v. Starkville Mun. Separate School Dist., 107
Montgomery v. Trinity Indep. School Dist., 11, 12, 174
Montour School Dist. v. Commonwealth of Pa. Human Relations Comm'n, 8
Moon Area School Dist. v. Gargony, 216
Moore v. District of Columbia, 123, 124, 125, 126, 127
Moran v. Board of School Trustees, 22
Morgan v. Nucci, 106
Mozert v. Hawkins County Pub. Schools, 85
Mrs. W. v. Tirozzi, 113, 131
Mueller v. Allen, 199
Mulligan v. Farmingdale School Dist. No. 22, 156
Murphy v. Pierre Indep. School Dist. No. 30-2, 26
Murry v. Watervliet City School Dist., 166

Nancy M. v. Scanlon, 68
Nash v. Auburn Univ., 256
National Coal Ass'n v. Hodel, 226
Nelson v. House, 158
Nelson v. Ronquillo, 189
Nelson, *In re*, 46
New Jersey v. T.L.O., 80
New Life Baptist Church Academy v. East Longmeadow, 73
New Milford Bd. of Educ. v. Juliano, 158
New York City Bd. of Educ. v. Division of Human Rights, 9, 36
New York Gaslight Club, Inc. v. Carey, 124
Newman v. Massachusetts, 245
Newsome v. Batavia Local School Dist., 94
NLRB v. Florida Memorial College, 242
NLRB v. Yeshiva Univ., 41, 242
Noel v. Andrus, 1
Nordlund v. Scholl Dist. No. 14, 33
North v. State, 259
North Carolina Dep't of Transp. v. Crest Street Community Council, 124
North Carolina Press Ass'n, Inc. v. Spangler, 196, 227
North Clackamas School Dist. v. White, 163
North East Community Bd. of Educ. v. North East Community School Dist., 24
Northeast Community School Dist. v. Public Employment Relations Bd., 45
Northeast Indep. School Dist. v. Hayes, 162
Northwest Indiana Educ. Ass'n v. School City of Hobart, 42
Northwestern Univ. Student Loan Office v. Behr, 251

Oates v. District of Columbia, 6, 193
O'Connor v. Wattsburg Area School Dist., 26
Oden v. Alabama State Tenure Comm'n, 34
O'Halloran v. University of Wash., 185
Ohio Ass'n of Pub. School Employees v. New Miami Local School Dist. Bd. of Educ., 63
Ohlmeier v. Community Consol. School Dist. No. 90, 31
Okure v. Owens, 230
Olavarrieta v. United States, 250
Oliver v. Fort Wayne Educ. Ass'n, 40
Opinion of the Justice to the Senate, 199, 224
Oregon School Employees Ass'n v. Pendleton School Dist. 16R, 55
Orner v. Mallick, 150

Orozco v. Sobol, 69
Osborn, *In re*, 251
OSEA v. Pendleton School Dist. 16R, 20
Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 47

Pabst v. School Dist. No. 59, Eagle Point, 184
Page v. Macchiarola, 31
Paisey v. Vitale, 258
Paladino v. Adelphi Univ., 150
Palella v. Ulmer, 146
Palmer v. Perry County Bd. of Educ., 32
Panola Junior College v. Estate of Thompson, 262
Parents for Quality Educ. v. Ft. Wayne Community Schools, 104
Pasadena City Board of Education v. Spangler, 106
Patchogue-Medford Teachers Congress v. Board of Educ., 13
Pemberton v. Cordova, 153
Pen-Nor, Inc. v. Oregon Dep't Higher Educ., 263
Penk v. Oregon State Bd. of Higher Educ., 232, 233
Pennhurst State School and Hospital v. Halderman, 77 78, 125
Pennsylvania Millers Mut. Ins. v. Crews, 158
People v. Hudy, 145
People v. Multari, 260
People v. Smith, 228
People v. Wehmeyer, 164
Perez v. Philadelphia Housing Auth., 135, 136
Perron v. Royal Oak School Dist. Board of Educ., 24
Perry v. Texas A & I Univ., 245
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 88
Pesce v. J. Sterling Morton High School Dist. 201, 13, 145
Peters v. Jim Walter Door Sales of Tampa, 167
Pettway v. Mobile County Bd. of School Comm'rs, 24
Phelps v. Washburn Univ., 249
Phenix City Bd. of Educ. v. Teague, 70
Philip Crosby Assoc. v. State Bd. of Indep. Colleges, 226
Pike-Delta-York Bd. of Educ. v. Pike-Delta-York Educ. Ass'n, 48
Pima County Juvenile Action, *In re*, 82
Pirrotta v. Independent School Dist., No. 347, 29
Pittsburg Bd. of Educ. v. WCAB, 162
Pittsburg Bd. of Pub. Educ. v. M.J.N., 95
Pizzola v. State, 261
Plyler v. Doe, 202
Pocahontas Community School Dist. v. Levene, 28, 61
Poland v. Grand Ledge Pub. School Bd. of Educ., 30
Post Adjunct Faculty Ass'n v. Board of Trustees, 48, 243
Pratt v. University of Minn. Affiliated Hosp. & Clinics, 263
Prescott v. Palos Verdes Peninsula Unified School Dist., 123
Prest v. Sparta Community Unit School Dist., 149
Preston v. Saif, 160
Price v. Oklahoma College of Osteopathic Medicine and Surgery, 239
Proviso Council of W. Suburban Teachers' Union v. Board of Educ., 50
Purris v. Board of Educ., 33

Quinn v. Signa Rho Chapter of Beta Theta Pi Fraternity, 264
Quintana v. Byrd, 8

Rabel v. Illinois Wesleyan Univ., 260
Refai v. Central Wash. Univ., 242
Railway Labor Executives' Ass'n v. Burnley, 137
Randall v. Hawkins, 30
Ray v. School Dist. of Desoto County, 131
Reddemann v. Minnesota Higher Educ. Coordinating Bd., 235
Reese v. Board of Regents of Utah, 225
Reeves v. Clairborne County Bd. of Educ., 11
Regents of the Univ. of Cal. v. Public Employment Relations Bd., 242
Regents of the Univ. of Mich. v. Ewing, 256
Regents of the Univ. of Minn. v. Medical Inc., 266
Rendell-Baker v. Kohn, 191
Richards v. New York City Bd. of Educ., 6
Riddick v. School Bd. of Norfolk, 99
Rios v. Board of Regents, Univ. of Ariz., 238
Ritter v. Mount St. Mary's College, 238
Robert Morris College v. United States, 246
Roberts v. Peterson, 156
Robertson v. Alabama State Tenure Comm'n, 30
Robinson v. Boyer, 244

Robinson v. City College of Chicago, 263
Robinson v. Lebanon City School Dist. Bd. of Educ., 10, 22
Robinson v. Pinderhughes, 113
Robinson v. Superior Court, 243
Roblee v. Corning Community College, 262
Rochester Area School Bd. v. Duncan, 27
Rochester Educ. Ass'n v. Independent School Dist., 41
Rochin v. California, 97
Rogers v. Department of Defense Dependents School, 22, 54
Rollison v. Biggs, 124, 125, 126, 127
Roman v. New York State United Teachers, 44
Romano v. Harrington, 12, 91, 176
Rose v. Currituck County Bd. of Educ., 35
Rosen v. Public Employment Relations Bd., 56, 242
Rosenberg v. University of Cincinnati, 232
Rosenfeld v. Ketter, 255
Ross v. Moore, 153
Rouse v. Wilson, 116, 117
Rowan County Bd. of Educ. v. United States Gypsum Co., Inc., 157
Rubek v. Barnhart, 170
Ruben, *In re*, 8
Rubin v. Regents of the Univ. of Cal., 235
Rubino v. Carlsbad Mun. School Dist., 151
Rudy v. Board of Educ., 16
Russell v. Salve Regina College, 131, 258

S-1 v. Spangler, 118
Saleh v. District of Columbia, 112
Salida School Dist. R-32-J v. Morrison, 4, 174, 175
Salmon Pineiro v. Lehman, 136
Salmond v. Board of Educ., 143
Samayoa v. Chicago Bd. of Educ., 103
San Antonio Indep. School Dist. v. Rodriguez, 202
San Bernardino City Unified School Dist. v. Superior Court, 156
San Francisco Teachers' Ass'n v. San Francisco Unified School Dist., 62
Sanders v. Judson College, 247
Sankar v. Detroit Bd. of Educ., 168
Santavicca v. City of Yonkers, 186
Schafer v. Arlington Heights Bd. of Educ., 25, 60
Schimmel v. Spillane, 117, 128
Schmerber v. California, 83
School Bd. v. Lee County School Bd. Employees Local 780, 57
School Bd. v. Public Employees Relations Comm'n, 57
School Bd. of Broward County v. City of Sunrise, 159
School Bd. of Nassau County, Fla. v. Arline, 8, 109, 132, 133, 134, 135
School Bd. of Prince William County v. Malone, 123, 124, 125, 126
School Bd. of Richmond v. Baliles, 102
School Bd. of the Parish of Livingston v. Louisiana State Bd. of Educ., 203, 204
School Comm. v. Boston Teachers' Union, Local 66, 55
School Comm. v. Labor Relations Comm'n, 64
School Comm. v. Norton Teachers' Ass'n, 53
School Dist. v. Northwest United Educators, 54
School Dist. 151 Bd. of Educ. v. State Bd. of Educ., 24
School Dist. of City of Grand Rapids v. Ball, 88
School Dist. of Philadelphia v. WCAB, 163
Schoolcraft College Ass'n of Office Personnel v. Schoolcraft Community College, 45, 243
Schwartz v. Florida Bd. of Regents, 233
Scott v. Blanchet High School, 145
Scott County School Dist. 2. v. Dietrich, 20
Scroggs v. Coast Community College Dist., 264
Searcey v. Crim, 89, 170
Section VI of the N.Y. State Pub. High School Athletic Ass'n, Inc. v. New York State Pub. High School Athletic Ass'n, Inc., 184
Segilia v. Riverside School Serv. Personnel Ass'n, 44
Selmeyer v. Southeastern Indiana Vocational School, 35
Selzer v. Board of Educ., 7
Service Employees Int'l Local Union No. 316 v. Illinois Labor Relations Bd., 52
Shamrock Serv., Inc., *In re*, 262
Shannon B., *In re*, 76
Sharon v. Larson, 136
Shelton, *In re*, 20
Shepard v. South Harrison R-11 School Dist., 19
Sherbert v. Varner, 87
Sherman College of Straight Chiropractic v. American Chiropractic Ass'n, 265
Sherpell v. Humnoke School Dist. No. 5, 99

Sherr v. Northport-East Northport Union Free School Dist., 87
Shuler v. University of Minn., 256
Shultz v. Brentwood, 152
Sifakis, *In re*, 8
Silano v. Tirozzi, 122, 130
Silavent v. Buckeye Cent. Local School Dist. Bd. of Educ., 35
Simons v. Laramie County School Dist. No. One, 207
Singleton v. Wulff, 12
Sinn v. The Daily Nebraskan, 255
Sinnott v. Skagit Valley College, 65
Sitomer v. Half Hollow Hills Cent. School Dist., 180
Skehan v. Board of Trustees of Bloomsburg State College, 236
Skehan v. State System of Higher Educ., 236
Smith v. Andrews, 36, 48
Smith v. Board of Educ., 22
Smith v. Board of School Comm'rs of Mobile County, 86
Smith v. Greater Amsterdam School Dist., 24
Smith v. Lansing School Dist., 50
Smith v. Normandy School Dist., 23
Smith v. Ohio N. Univ., 249
Smith v. Robinson, 123, 126, 130
Smith v. Workers' Compensation Bd., 161
Sobel v. Wingard, 165
Sobel v. Yeshiva Univ., 233
Sorey v. Kellett, 187, 261
SOS Alford v. School Bd. of Jackson County, 70
South Dakota Bldg. Auth. v. Geiger-Berger Assoc., 262
South Benton Educ. Ass'n v. Monroe Union High School Dist. No. 1, 61
Southeastern Community College v. Davis, 4
Southern Methodist Univ. v. Times Herald Printing Co., 196
Southside Pub. Schools v. Hill, 11, 175
Specialty Cabinet Co., Inc. v. Montoya, 262
Sprague v. University of Vt., 240
Springdale Bd. of Educ. v. Bowman, 94
St. Francis College v. Al-Khazraji, 237
St. John the Baptist Parish Ass'n of Educators v. St. John the Baptist School Bd., 63
St. Louis Teachers Union, Local 420 v. Board of Educ., 13
St. Paul Mercury Ins. Co. v. Duke Univ., 265
Stahl v. Cocalico School Dist., 154
Stansberry v. Argenbright, 19
Stark v. Troy State Univ., 246
State ex rel. Bartmess v. Board of Trustees of School Dist. No. 1, 179
State ex rel. Runyan v. Henry, 65
State Industrial Comm'n v. Harlan, 263
State Sys. of Higher Educ. v. Pennsylvania Labor Relations Bd., 56, 243
State Univ. Agricultural and Technical College at Farmingdale v. State Div. of Human Rights, 235
State v. Board of Educ., 23
State v. Francosi, 160
State v. Hansen, 145
State v. Lillard, 22
State v. Project Principle, Inc., 37
State v. Schmidt, 74
State v. Sturgeon, 259
State v. Trucke, 75
State v. Turner, 191
State v. Woodley, 145, 191
Staten v. Couch, 182
Stein v. Plainwell Community Schools, 86
Stephanidis v. Yale Univ., 131, 249
Stober, *In re*, 9, 136
Stokes v. University of Tenn. at Martin, 244
Stone v. Cornell Univ., 256
Stone v. Graham, 84
Stoneking v. Bradford Area School Dist., 13, 172
Stout v. Grand Prairie Indep. School Dist., 153, 188
Strayer v. Rensen-Union Community School, 3
Students Against Apartheid Coalition v. O'Neil, 253, 254
Stundon v. Sterling, 159
Sublette v. Board of Educ., 15
Sullivan v. Board of Educ. of Eastchester Union Free School Dist., 16, 169
Susan R.M. v. Northeast Indep. School Dist., 111
Susquehanna Valley Teachers' Ass'n v. Board of Educ., 54
Sutherland-Wagner v. Brook Park Civil Serv. Comm'n, 23
Sutliff, *In re*, 252
Swaney v. Secretary, United States Dep't of Educ., 252
Swanson v. Wabash College, 187, 261
Sweet Home Cent. School Dist. v. Sweet Home Serv. Employees Ass'n, 46

Taborn v. Hammonds, 17, 27
Tafoya v. Hastings College of Law, 227

Tangipahoa Parish School Bd. v. United States Dep't of Educ., 77, 210
Tapo v. Columbus Bd. of Educ., 49
Tarkanian v. NCAA, 190
Taylor v. Angarano, 259
Taylor v. Dothan City Bd. of Educ., 33
Taylor v. Klund, 151
Tebordo v. Cold Springs Harbor Cent. School Dist., 22
Teider v. Little, 265
Temple Univ. v. Commonwealth Dep't of Pub. Welfare, 226
Temple Univ. v. United States, 246
Templeton, *In re*, 247
Texas Review Soc'y v. Cunningham, 254
Thelma D. v. Board of Educ., 172
Thomas v. Atascadero Unified School Dist., 132
Thomas v. Board of Examiners, Chicago Pub. Schools, 14
Thomas v. Review Bd., 74
Thomas Jefferson School, Inc. v. Kapros, 79
Thompson v. Waynesboro Area School Dist., 89
Thornton v. University Civil Serv. Merit Bd., 244
Three Village Teachers' Ass'n v. Three Village Cent. School Dist., 50
Tilton v. Town of Franklin, 169
Tinker v. Des Moines Indep. Community School Dist., 91
Todhunter v. Cullman County Comm'n on Educ., 7
Tomiak v. Hamtramck School Dist., 30
Tompkins v. Forest Grove School Dist., 115
Torsiello v. Oakland Unified School Dist., 141
Totan v. New York City Bd. of Educ., 142
Toure v. Board of Educ., 149
Town of Burlington v. Department of Educ. and Massachusetts, 129
Townsend v. State, 186, 261
Trustees of Boston Univ. v. Licensing Bd. of Boston, 8
Turlington v. Ferris, 37
Tuttle v. Bloomfield Hills School Dist., 48
Tye v. Board of Educ., 7
Tyler v. Hot Springs School Dist. No. 6, 5

Unatego Nonteaching Ass'n v. New York State Pub. Employment Relations Bd., 56
Unified School Dist. No. 259 v. Newton, 123, 124, 125
United Fed'n of Teachers Local 11, *In re*, 54
United Pub. Employees Local 390/400 v. San Francisco, 58
United School Dist. v. Rushkin, 33
United States v. Alabama, 229
United States v. Bills, 252
United States v. Fowler, 252
United States v. Gavilan Joint Community College Dist., 253
United States v. Lawrence County School Dist., 32
United States v. Overton, 98, 99
United States v. Pittman, 104
United States v. Redovan, 252
United States v. Texas Educ. Agency, 98
United States v. Turner, 252
United Teachers of Dade v. Dade County School Bd., 39
United Teachers of Flint v. Flint School Dist., 45
University of Cincinnati v. Secretary of Health and Human Servs., 226
University of Denver v. Whitlock, 260
University of Fla. v. Moore, 244
University of Fla. v. Mossburg, 244
University of Minn. v. Goodkind, 244
University of Tex. at Austin v. Joki, 246
University of Toledo v. Heiny, 248
University of Utah v. Industrial Comm'n, 235
University of Utah Students Against Apartheid v. Peterson, 254
Upadhya v. Langenberg, 239
Urbana College v. Conway, 253
Urdahl v. Independent School Dist. No. 181, 27

Valles v. Arizona Bd. of Regents, 245
Vance v. Texas A & M Univ. Sys., 230
Vander Ayl v. Iowa Professional Teaching Practices Comm'n, 37
Vander Malle v. Ambach, 114, 119, 128
Vargas-Figueroa v. Saldana, 243
Velmer v. Baraga Area Schools, 155
Ventura v. Winegardner, 189
Verdeyen v. Board of Educ., 28, 60
Vienna School Dist. No. 55 v. Illinois Labor Relations Bd., 63
Vinson v. Superior Court, 245
Virginia Polytechnic Inst. and State Univ. v. Wood, 262
Voight v. Teachers College, Columbia Univ., 263

W.A.N. v. School Bd. of Polk County, 95
Wade v. Anchorage School Dist., 161
Wagschal v. Board of Examiners of Bd. of Educ., 36

Walch v. Red Hill Borough, 148
Walker v. State, 164
Wall v. Tulane Univ., 246
Wallace v. Jaffree, 84, 85
Walsh v. Sto-Rox School Dist., 29
Walters v. Fullwood, 192
Washington Univ. Bd. of Regents v. Seattle, 227
Waser v. San Diego Union, 165
Watrel v. Comamonwealth, Dept. of Educ., 247
Waugh v. Board of Educ., 20
Weaver v. Board of Educ., 18
Webb v. McCullough, 94, 95
Weinstein v. University of Ill., 239
Weinstein v. Board of Educ., 152
West Virginia Dep't of Human Servs. v. Boley, 24
West Shore School Dist. v. West Shore Educ. Ass'n, 53
Westbrook v. Board of Educ., 23, 150
Western Airlines v. Criswell, 8
Westgard v. Independent School Dist. No. 745, 29
Westley v. Terrebome Parish School Bd., 16
Wethersfield Bd. of Educ. v. Connecticut Bd. of Labor Relations, 45
Wheaton College v. Department of Revenue, 227
White v. Naquin, 163
White v. State, 114, 122
White v. University of Ark., 230
Whitley v. Oologah School Dist., 157
Whitlock v. Duke Univ., 261
Whitlock v. University of Denver, 260
Wilkes-Barre Area Educ. Ass'n v. Wilkes-Barre Area School Dist., 64
Willan v. Menomonee Falls School Bd., 103
Williams v. City of Pittsburgh, 17
Williams v. Salerno, 259
Williams v. Turlington, 37
Wilson, *In re*, 252
Wilson v. University of Va., 231
Wisconsin v. Yoder, 71
Wislocki-Gain v. Mears, 7
Wolman v. Walter, 74
Women's Equity Action League v. Bell, 229
Wood v. National Computer Sys. Inc., 168
Wood v. Strickland, 83
Wooten v. Dekalb City Bd. of Educ., 29
Work v. McKenzie, 120
Wright v. Cayan, 244
Wurster v. Commonealth, Unemployment Compensation Bd., 248
Wygant v. Jackson Bd. of Educ., 4, 5
Wynn v. Board of Educ. of Vestavia Hills, 81

Yale Univ. v. Fisk Univ., 228
Yarbrough v. City Univ. of N.Y., 261
Yaris v. Special School Dist. of St. Louis County, 125
Yatrin v. Madison Metro. School Dist., 7
Youngblood v. Sanders, 159

Zemsky v. City of New York, 159
Zimmerman v. Foundation of the French Int'l School, 43
Zuments v. Colorado High School Activities Ass'n, 180
Zuromski v. Providence School Comm., 53

INDEX

academic dismissal—see dismissal
academic freedom, 84, 236
acquired immune deficiency syndrome (AIDS), 109, 110, 114, 131-134, 136
admission, 248-250
admission to the bar, 250
advancement of religion—see constitutional rights
affirmative action, 5
age discrimination—see discrimination
Age Discrimination in Employment Act of 1975 (ADEA), 2, 4, 234, 238, 249
agency shop fees, 39, 40
alcoholic beverage—see drugs
American Arbitration Association, 40
American Association of University Professors, 41
apartheid, 253, 254
appropriations bill, 224
asbestos, 157
assault/battery, 160, 163, 164, 186
assessment ratio, 201
assignment (pupil), 68-70, 95
astroturf, 187, 188
attorney fees, 8, 64, 65, 72, 88, 123-128, 130, 190, 196, 216, 224, 226, 230, 232, 236, 239, 247, 249, 259
back pay, 4, 6, 9, 35, 190, 236, 238, 243, 266
bankruptcy, 252
bargaining, 38-65—see collective bargaining
bilingual/bicultural education, 76-78, 210, 211
bonds, 225
breach of contract—see contracts (disputes)
bumping—see reduction-in-force
bus/busing/bus drivers, 147, 148, 155, 159, 173

call-back rights—see reduction-in-force
campus police, 228, 230
certification/decertification, 36
change in placement—see placement
child abuse, 13, 145, 156, 172
Civil Rights Act of 1866
section 1981, 3, 231
Civil Rights Act of 1871
section 1983, 4-7, 13, 88, 170, 172-176, 185-187, 230, 237, 257, 258
Civil Rights Act of 1964
title VI, 229, 230
title VII, 2, 4-8, 59, 80, 194, 230, 231, 233, 238, 239, 241
Civil Rights Attorney's Fees Act, 88
Civil Rights Restoration Act, 183
chiropractic, 265
class action, 232
class size, 100
clear and convincing evidence standard, 37
collateral estoppel, 4
collective bargaining
agreement, 5, 62, 63, 234, 239, 242
arbitrability, 47-51
dues deduction, 42
duty of fair representation (DFR)—see representation (below)
management perogatives, 50
negotiable items—see scope of bargaining (below)
representation, 41, 44, 53, 242
scope of bargaining, 39, 45-47
union rights and obligations, 39, 242
unit determination, 40, 41, 242
college defined, 226
community college, 224
comparative negligence—see tort (negligence)
compensation—see wages
compensatory damages, 12, 83, 85, 87
compliance with board policies and state statutes, 22-24
compulsory attendance, 71, 75, 76, 79
confidentiality, 13, 145, 256
conflict of interest, 220, 221, 225
Connick doctrine, 10, 11
constitutional rights, 40, 224, 228, 256
association, 12, 180
expression, 255
privacy, 13
religion, 253
speech, 10-12, 88-92, 175, 236, 237, 253, 254
contagious disease, 9
contracts, 262-263
continuing, 220
disputes, 30, 65, 187, 192, 193, 224, 228, 234, 245, 247, 262, 263
lease payment, 220
liability, 166
supplemental, 61, 220
contributory negligence—see tort (negligence)
cooperative federalism, 129
corporal punishment, 96-98, 164, 171, 172
creation science, 83, 84

damages, 62, 122, 215, 216, 244, 247, 259, 261
defamation—see tort (intentional)

Deficit Reduction Act of 1984, 246
demotion, 17-24
Department of Defense Dependents School, 46, 47
Department of Labor, Division of Workman's Compensation—see worker's compensation
desegregation/segregation/integration, 32, 98-107, 109
  cross district, 100
  plan oversight, 100-102, 104-107
  systemwide remedies, 98-100
  unitary status, 98, 106
discipline
  employment, 17-24
  student, 145, 146, 255
discrimination, 249
  age, 3, 8, 231, 234, 235, 249, 256
  employment, 1-9
  ethnic characteristics, 8
  handicap, 2, 8, 9, 235, 248, 249, 256
  maternity, 238
  national origin, 7, 8, 236, 237, 258
  race, 4-6, 230, 231, 238, 248, 249, 257, 259
  religion, 231
  sex, 2, 6-8, 59, 183, 184, 193, 231, 232, 235, 236, 238, 245, 256, 259
dismissal, 17-24, 244
district rights, 3
diving accident, 261
doctrine of *res judicata*, 4, 59, 249
drinking—see drugs (alcohol)
drugs/narcotics, 80, 82, 137
  alcohol, 82, 93, 137, 150, 160, 189, 228, 244, 256, 260, 261, 264
  cocaine, 82, 259
  marijuana, 82, 94, 95, 151, 241, 256, 259
  testing, 82, 83, 185
due process clause—see fourteenth amendment

economic harm, 15, 16
Education Amendments of 1972
  section 168(a), 182
  title IX, 2, 131, 182, 183, 234, 241
Education for All Handicapped Children Act of 1975 (P.L. 94-142), 112, 174
  administrative remedies, 113-115
  discipline, 121, 122
  related services, 119-121
  stay put/status quo, 111-113
  summer school, 209
Educational Testing Services, 248
eighth amendment, 96-98, 121, 174
Elementary and Secondary Education Act of 1965, 120
eleventh amendment, 77, 104, 118, 125, 132, 187, 230, 231, 236, 237, 257, 259, 265
eligibility rules, 179-182
emotional distress, 16, 168-170
employee discrimination, 1-9
employee injuries—see worker's compensation
employers, 1-37, 228-248
entitlement to services, 109, 110
Equal Access Act, 97, 99, 170, 254
equal educational opportunity, 180, 200, 201
Equal Employment Opportunity Commission (EEOC), 59, 194, 234
Equal Pay Act (EPA), 2, 6, 194, 233, 234, 238
equal pay theory, 6
equal protection clause—see fourteenth amendment
establishment clause—see first amendment
estoppel, 62, 227, 238, 257
evaluation, 45
excessive entanglement—see first amendment (establishment clause)
exclusionary rule—see search and seizure
expert witness, 163
expulsion/expel—see suspension (student)
extended school year—see Education for All Handicapped Children Act of 1975 (summer program)
extracurricular activity/sports
  baseball, 144, 185, 187, 188
  basketball, 185, 186, 261
  cheerleading, 188, 261
  diving, 261, 264
  enroute to game, 189
  equality of programs, 183
  fees, 196, 197
  field hockey, 184
  football, 183, 184, 186, 187, 261
  ice hockey, 181
  Reserve Officer Training Corps (ROTC), 182
  sledding, 261
  spectator, 189, 264
  state association membership, 185
  student clubs, 90, 161
  swimming, 144
  touch football, 144
  trampoline, 260
  wiffleball, 143
  wrestling, 179

Fair Debt Collection Practices Act, 252
fair share fees, 40
federal funds for education, 209-212
fees, 212
felony charge, 243
fifth amendment, 174

finance, 198-221
financial aid, 250-253
first amendment, 10, 65, 73, 75, 83-88, 91, 170, 199, 236, 253-255
  establishment clause, 74, 80, 83-88, 109
    advance nor inhibit, 84
    excessive entanglement, 74, 84
  free exercise clause, 84
  protected speech, 175
forum—see Equal Access Act
foundation programs—see public school funding
fourteenth amendment, 3, 5, 40, 174, 183, 188, 238, 244, 246, 248, 255-257, 259
  due process, 37, 39, 74, 75, 82, 83, 118, 170, 171, 174, 180, 181, 185, 214, 237, 249, 258
    substantive, 13, 96, 97, 179, 256, 259
    procedural, 13, 14, 190, 240, 256
  liberty right, 14, 15, 73, 176, 190
  property right, 14, 15, 244
  equal protection, 3, 37, 68, 70, 71, 92, 93, 125, 164, 174, 179-181, 184, 185, 202-207, 230, 246, 257
fourth amendment, 174
fraternity, 260, 266
free exercise clause—see first amendment
freedom of association—see constitutional rights
freedom of information—see open meetings/records
freedom of petition—see constitutional rights
freedom of religion—see constitutional rights
freedom of speech—see constitutional rights
fringe benefits—see wages
fundamental right, 212

garnishment, 247, 252
gay rights—see homosexual
gifted students—see individualized education program (IEP)
government immunity—see immunity
grievance, 42, 46-51, 243, 245
guardianship, 68

handicap discrimination—see discrimination
Handicapped Children's Protection Act (HCPA), 123, 124
hearing, 16, 17, 240
hepatitis B, 132
higher education, 222-266
hispitals, 226, 228
home instruction, 71-75
homosexual/gay/lesbian, 21, 134, 135, 173
human immunodeficiency virus (HIV), 134, 136

immorality, 20, 21
immunity, 151-155, 237
  governmental, 151-153, 157, 167, 187, 188, 244, 245, 263
  statutory, 153-155
impact aid, 2, 11, 212
in loco parentis, 94, 144, 260
incompetence, 22
individualized education program (IEP), 110, 115, 117
inhibiting religion—see first amendment
insubordination, 18
intentional tort—see tort
invasion of privacy, 165, 168, 169
involuntary leave of absence—see leaves

judicial review, 51-63
jury trial, 76

leaves
  disability, 244
  involuntary, 46
  maternity, 26
  sabbatical, 33
  sick, 19, 33, 217-219
lesbian—see homosexual
liability, 158, 166-168, 260-266
  product, 167, 168
libel—see tort (intentional)
liberty right—see fourteenth amendment
licensure—see certification
life—see fourteenth amendment

mainstreaming—see placement
malpractice—see tort
mandatory topics of bargaining—see collective bargaining (scope)
marital status, 3
medicare, 226
meditation—see prayer
mental anguish, 9
migrant education, 210
minimum school age, 110
moral turpitude—see immorality.

National Labor Relations Act, 41
National Labor Relations Board, 41
national origin discrimination—see discrimination
negligent tort—see tort
nepotism, 3
noncompliance with Bilingual Education Act, VII, 211

nonrenewal, 17-24, 191
North Central Athletic Association (NCAA), 181, 185, 190, 191, 193, 196
notice, 16, 214, 225

open meetings/records laws, 195, 196, 226, 227, 235-238, 240

pension, 4
permissive topics of bargaining—see collective bargaining (scope)
placement, 111-113, 115-119
  least restrictive environment (LRE), 115, 116
  mainstreaming, 116
  private, 110, 116
  unilateral, 116
plagiarism, 245
prayer, 85, 86
preponderance of evidence standard, 37
prior restraint—see publications
privacy—see search and seizure
private and parochial schools, 79, 80
privileged communication, 250
probable cause, 81
probation, 3, 13
prohibited topics of bargaining—see collective bargaining (scope)
property right—see fourteenth amendment
public forum—see Equal Access Act
Public Law 94-142—see Education for All Handicapped Children Act of 1975
Public Law 99-457—see Education of the Handicapped Amendments Act of 1986
public records—see open meetings/records
public school funding, 200-212
  ad valorem taxes, 201, 216
    municipal use of school ad valorem tax revenues, 213
    underassessment, 200, 206
  delinquent taxes, 215, 216
  federal funds, 209-212
  income taxes, 204-206
  minimum foundation programs, 203, 206

  need for school district reorganization, 200
  penalties, forfeitures, and fines, 201
  referenda, 214, 215
  revenue disbursement, 214
  special education, 208, 209
  state finance programs, 200, 208
  taxable wealth, 201
  title XX of the Social Security Act, 209
publications, 89-92
pupils, 67-104

race discrimination—see discrimination
rape—see sexual assault
rational relationship/rational basis—see fourteenth amendment (equal protection)
realignment and reassignment, 28-30, 32
reasonable suspicion—see search and seizure
recovery of funds
  bilingual education, 211
  misused federal, 76, 77
  over allocation of migrant education funds, 210
  special education, 208, 209
  student financial assistance, 250, 251
  title I, 210
reduction-in-force (RIF), 25-30, 60, 61, 242
  criteria, 27
  recall, 30
referenda, 214, 215
Rehabilitation Act of 1973, 258
  section 504, 2, 9, 109, 110, 130-138, 248, 249
reinstatement, 190, 238, 242
religious discrimination—see discrimination
residency requirement, 32
respondeat superior, 186, 188, 189
retaliation, 6, 7, 10, 12, 56, 57, 175, 233, 234, 239, 240
retirement, 246, 247
right of association—see constitutional rights

sabbatical leave—see leaves
salary—see wages
sanctions for student misconduct, 93-96
scholarship awards, 251, 252
search and seizure, 80-83
  reasonable suspicion, 80-83
section 504-see Rehabilitation Act of 1973
section 701—see Civil Rights Act of 1964 (title VII)
section 1981—see Civil Rights Act of 1866
section 1983—see Civil Rights Act of 1871
section 1985—see Civil Rights Act of 1871
section 1988—see Civil Rights Attorney's Fees Act
secular humanism, 86
segregation—see desegregation
seniority, 39, 63, 65
separation of powers, 229, 246

sex discrimination—see discrimination
sexual assault/molestation/rape, 13, 143, 145, 156, 159, 160, 172, 173, 179
sexual harassment/activity/advance, 190, 238, 242, 245
sexual privacy, 179
sexual relations/misconduct, 176, 191
shanties (symbolic), 253, 254
sick leave—see leaves
slander—see tort (libel)
social service agency assignment, 69
special education funds, 208, 209
speech—see constitutional rights
sports, 179-197—see extracurricular activities
standing, 229
state and federal jurisdictional conflicts, 4
state funding formulas—see public school funding
statute of limitations, 43, 62, 128, 156, 157, 187, 194, 214, 219, 230, 249
stay put/status quo—see Education for All Handicapped Children Act of 1975
strict liability—see tort
strike, 57, 63, 64
student financial aid, 250-253
student injuries, 140
substantive rights of students, 80-92
summer program—see Education for All Handicapped Children Act of 1975
sunshine laws, 226
surplus funds, 214, 2151
suspension (pupil), 93-96, 112, 165

tape recordings, 162
tax
  delinquent taxes, 215
  exempt status, 195, 216-218, 227
  refunds, 214
  underassessment, 200
tenure, 34-36, 236-241
  de facto, 237, 239, 245
  nonrenewal, 237, 239, 245
  nontenured, 236-239
  status, 34, 35
  termination, 239-243
  tenured, 239-242
timely notice, 54, 155, 156, 214
title I—see Elementary and Secondary Education Act of 1965
title VI—see Civil Rights Act of 1964
title VII—see Civil Rights Act of 1964
title IX—see Education Amendments Act of 1972
tobacco—see drugs
topics of bargaining—see collective bargaining (scope)
tort, 139-177, 235, 248
  constitutional, 170-177
  intentional, 186, 265
    defamation, 16, 164, 165, 186, 235, 240, 261
  libel, 165, 166
  malpractice, 150-151, 263, 264
  negligence, 140-150, 166, 187-189, 264, 265
    comparative, 157, 168, 162-164
    contributory, 142, 147
transfer of national park land, 226
transportation, 68-71, 147, 148, 155, 159, 173, 212
transvestite, 134, 135
tuition, 68-70, 79, 116, 253
tuberculosis, 8, 109, 133, 134

unemployment compensation, 194, 247, 248, 251, 252
unfair labor practice, 242, 243
unfitness, 19, 20
unilateral placement—see placement
union activities, 11, 43
United States Code, volume 42, secton 1988, 127
United States Constitution
  Article I, 124
  Article II, 229
unprofessional conduct, 19, 20
urinalysis, 13
use of school facilities—see Equal Access Act

votes/voting rights, 259

wages, 242
  health care benefits, 247
  increased salary awards, 246
  military service credit, 247
  retirement benefits, 246, 247
  salary continuation benefit, 137
  summer school pay, 246
  tuition waiver benefit, 246

welfare, 226
whistle blowing, 47
willful neglect of duty, 19, 20
worker's compensation, 159-164, 194, 195, 261, 262
workman compensation—see worker's compensation
wrongful death, 187, 188, 228

zoning, 227, 228